In the United States Court of Appeals for the Ninth Circuit

No. 12511

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN AND GEORGE K. BRAMLEY, APPELLANTS,

v.

PAUL MALLONEE, ET AL., APPELLEES

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL., APPELLANTS,

v.

FEDERAL HOME LOAN BANK OF LOS ANGELES, ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANTS AND APPENDIX

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OPINION AND ORDER OF THE DISTRICT COURT

The oral opinion of the District Court appears at R. 11146, and the Order of Preliminary Injunction at R. 8194.

JURISDICTIONAL STATEMENT

This is an appeal by appellants Home Loan Bank Board, William K. Divers, O. K. LaRoque, J. Alston Adams, John H. Fahey, A. V. Ammann and George K. Bramley, individ-

ually and in their respective representative and official capacities, if any; the Federal Savings and Loan Insurance Corporation; and the Federal Home Loan Bank of San Francisco, from a Preliminary Injunction issued by the United States District Court for the Southern District of California enjoining (1) the Home Loan Bank Board, its members, and other persons and defendants from holding or participating in an administrative hearing which was on September 9, 1949, ordered by Home Loan Bank Board Order No. 2015 to be held in Washington, D. C., on October 25, 1949, and (2) the initiation of or participation in any administrative or judicial proceedings by any person in conflict with the alleged jurisdiction of the court below (R. 8306).

The injunction was issued in connection with two separate actions which the District Court consolidated into one action (R. 8223-8224). The first of these, No. 5421-P.H., hereinafter referred to as the "Mallonee action", was an action by shareholders of the Long Beach Federal Savings and Loan Association suing derivatively, with a substantially identical cross-claim by the Association, to oust a Conservator appointed on May 20, 1946, for that Association by the Federal Home Loan Bank Administration and for other relief. The court below was alleged in both the complaint (R. 2961-2962) and cross-claim (R. 3189-3191) to have jurisdiction by reason of the presence of a substantial Federal question and diversity of citizenship. 28 U.S.C. 1331, 1332. It was further alleged that the amount involved was approximately $70,000,000 (R. 2962, 3190).

The second action, No. 5678-P.H., hereinafter referred to as the "Los Angles action", was instituted by the Federal Home Loan Bank of Los Angeles and six of its member financial institutions (R. 9466) to set aside as void three orders, dated March 29, 1946, of the Federal Home Loan Bank Administration which, *inter alia,* dissolved the Federal Home Loan Bank of Los Angeles and transferred its assets and liabilities to the Federal Home Loan Bank of San Francisco. Jurisdiction was based on the allegations that

the action arose under the Constitution and laws of the United States and that the amount in controversy exceeded the sum of $45,000,000 (R. 9466).

The order of preliminary injunction was filed on December 1, 1949, and entered in Judgment Book No. 62, p. 18, of that Court on December 2, 1949 (R. 8537). Notice of Appeal was filed by all appellants except the Federal Home Loan Bank of San Francisco on December 29, 1949, and by the Federal Home Loan Bank of San Francisco on January 5, 1950 (R. 8559).

This Court has jurisdiction of this appeal under Section 1292 of Title 28 U.S.C.

STATEMENT OF THE CASE

A. *Summary Outline of Proceedings Prior to the Injunction on Appeal.*

Dissolution of the Los Angeles Bank: On March 29, 1946, the Federal Home Loan Bank Administration, predecessor of appellant Home Loan Bank Board (R. 8196n) issued and carried into effect three orders, Numbers 5082, 5083, and 5084, pursuant to Sections 3, 25 and 26 of the Federal Home Loan Bank Act (App. A, *infra,* p. 114), readjusting the Eleventh Federal Home Loan Bank District so as to include the territory of the then Twelfth District, dissolving the Federal Home Loan Bank of Los Angeles which had served the Twelfth District, transferring its assets and liabilities to the Federal Home Loan Bank of Portland serving the Eleventh District, and reconstituting the latter as the Federal Home Loan Bank of San Francisco with headquarters at San Francisco, California. These orders expressly recited, in substantially the words of Section 26 of the Act, that "the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action".

The Long Beach conservatorship, May 1946 to January 1948: On May 18, 1946, the Federal Home Loan Bank Administration commenced an investigation of the affairs of the Long Beach Federal Savings and Loan Association, Long Beach, California (R. 3209), as authorized and

directed by Section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464) (App. A, *infra,* p. 130).

On the same day, T. A. Gregory, president and member of the board of directors of the Association, together with three other directors thereof, converted or attempted to convert their existing savings (share) accounts in the Association and other funds into 21,000 separate one dollar ($1.00) savings accounts (R. 3231, 3241-3). The 21,000 separate one dollar accounts represented 10 per cent of the total votes available to all of the Association's members (R. 3242).

On the same day, a check of $50,000 was paid by an officer of the Association to R. H. Wallis, an attorney, pursuant to a resolution of the Association's board of directors, dated May 8, 1946 (R. 3230, 3239-3240). The resolution was adopted in purported anticipation of "retaliation" by "federal supervising authorities", and authorized the expenditure of $100,000 to employ legal counsel to conduct proceedings to "restrain" the Federal Home Loan Bank Commissioner, the defendant Fahey, from "interfering" with the "normal" conduct of the Association's business (R. 3237). The funds thus appropriated were intended to be used to defend against the anticipated appointment of a Conservator for the Association on allegedly unwarranted charges of personal misconduct by the Association's management (R. 91-93, 3227, 3232, 3237-3239).

On May 20, 1946, pursuant to Section 5(d) of the Home Owners' Loan Act (12 U.S.C. 1464(d); App. A, *infra,* p. 130), the Administration issued its Order No. 5254, appointing the defendant A. V. Ammann Conservator for the Association upon the stated ground that the Association had a management which was "unsafe" and "unfit to manage" a Federal savings and loan association (App. C, *infra,* p. 172).

On May 29, 1946, pursuant to the Association's request (R. 345-346), the Administration furnished a "More Definite Statement" of the grounds for the Conservator's appointment (App. C, *infra,* p. 173). The "Statement" recited (in addition to the creation of the 21,000 share accounts and the authorization for attorneys' fees), the

disbursement to T. A. Gregory of $14,500 of the Association's funds for purposes alleged to be beyond the scope of the Association's business; the reimbursement of the $14,500 by a retroactive increase of $11,750 in said Gregory's salary for the preceding year 1945, and the increase of his salary, effective January 1, 1946, from $8,250 per annum to $20,000 a year, with an entry offsetting the $14,500 against the increase of $11,750 for 1945 and the salary increase for the first three months of 1946; the use of the Association for personal gain of one or more of its officers; and the report, which had but recently become known to the Administration, that Gregory had previously so manipulated the affairs of another association, the Reliable Building-Loan Association, Long Beach, California, as to acquire its certificates at a small fraction of their true value and thereafter caused them to be paid in full. For these reasons, the "Statement" declared, the Association, "in the opinion of the Federal Home Loan Bank Administration, had a management which was unfit and unsafe to manage a Federal Savings and Loan Association" (App. C, *infra,* p. 176).

The conservatorship was terminated on January 24, 1948 (R. 8320), pursuant to Order No. 338 of the defendant Home Loan Bank Board, the Administration's successor.

Long Beach's prevention and deferment of administrative hearing: At the Association's request (R. 140), an administrative hearing was originally scheduled for July 3, 1946, to determine whether the Conservator's appointment was warranted or should be terminated (R. 144). Before the scheduled date for administrative hearing, however, the Association's shareholders commenced this litigation, in the course of which the administrative hearing was first enjoined, and thereafter, at the Association's request (R. 2908), deferred throughout the 19 months of the conservatorship (R. 372, 745, 8230-1).

The original complaints and cross-claims: The validity of the Conservator's appointment and his each and every act in the management of the Association was promptly challenged in the court below, both by plaintiffs, shareholders of the Association, in a complaint filed May 27, 1946

(R. 2), and by the "defendant" Association, in its cross-claim filed July 1, 1946 (R. 323), as well as by the "defendants" R. H. Wallis (the above mentioned attorney) and Title Service Company (named as trustee under trust deeds securing loans made by the Association to some 8,000 borrowers) in cross-claims in "interpleader" filed on June 12 and June 4, 1946, respectively, alleging conflicting demands on said cross-claimants by the Conservator and the Association's former management concerning individual transactions in the operation of the Association (R. 49, 95).[1]

Plaintiffs and cross-claimants each alleged that the order appointing the Conservator was unconstitutional and was issued solely because of "malice" of the defendant Fahey against Gregory (R. 15-16, 348), and that prior resort to the administrative remedy should not be required because of "bias and prejudice" of the defendants Fahey and Ammann and because they had "already decided and determined the issues upon which they proposed to hold said administrative hearing" (R. 364). The administrative hearing was, in fact, promptly enjoined by restraining order of July 1, 1946 (R. 372).

On July 1, 1946, the Association filed a third party complaint against the San Francisco Bank challenging the validity of the orders of March 29, 1946, dissolving the

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[1] Cross-claimant Wallis tendered in court the above mentioned $50,000 check praying for a determination whether he should return the check as demanded by the Conservator or use it for the purposes previously authorized by the Association's board of directors, as demanded by the Association's former management (R. 98). Title Service Company deposited in court 174 trust deeds transmitted to it by the Conservator with the information that the borrowers had made final payment and requesting the Company to execute a reconveyance to the borrower, and prayed for judgment whether the Company should execute such reconveyance as demanded by the Conservator, or refuse to do so, as demanded by the Association's former management. Title Service Company also prayed that the trust deeds on the remaining 8,000 loans, which were in the physical custody of the Conservator, be ordered to be deposited in court (R. 53). As a result, at least fifty interventions in the Mallonee action were filed by borrowers to obtain reconveyances. See *infra*, p. 16.

Los Angeles Bank (R. 287). The latter Bank, named as a nominal defendant, filed a like cross-complaint against the San Francisco Bank (R. 564). On August 22, 1946, the Los Angeles Bank and six of its former member associations filed an identical complaint in an independent proceeding, herein referred to as the "Los Angeles action" (R. 9465).

The original District Court decree of injunction: On September 5, 1946, before any answer of the Government defendants was filed or due, a three-judge District Court held Section 5(d) of the Home Owners' Loan Act of 1933 unconstitutional, and, on September 30, 1946, entered a decree removing the Conservator and permanently enjoining the holding of an administrative hearing (R. 743). On the next day, however, October 1, 1946, the Honorable Wiley Rutledge, Associate Justice of the United States Supreme Court, entered an order staying enforcement of the decree pending appeal to the Supreme Court (R. 762).

Reversal by Supreme Court: On June 23, 1947, the Supreme Court unanimously reversed the judgment of the District Court, holding that "it was error in the court below to hold the section unconstitutional, to oust the Conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted by law". *Fahey* v. *Mallonee,* 332 U.S. 245, 257-258. The Supreme Court also set aside a provision of the District Court's decree enjoining the defendants from merging the assets of the Association with those of any other institution, on the Government's assurance that there was no intention to effect any such merger. 332 U.S. at 257. "We cannot agree", the Court said, "that courts should assume in advance that an administrative hearing may not be fairly conducted." *Id.* at 256.

Filing of amended and supplemental complaints and cross-claims: Judge Hall, before whom all subsequent proceedings were held, concluded that the administrative remedy need not be invoked provided the pleadings were amended to allege "fraud" (R. 10298, 10300), and, on

November 10, 1947, gave leave to amend accordingly (R. 2793).[2]

Amended pleadings alleging "fraud" were filed by the shareholders on December 9, 1947 (R. 2960), and by the Association on January 12, 1948 (R. 3184). Cross-claims for money damages were subsequently filed by the Association (R. 4161).

On November 10, 1947, the court below overruled motions to dismiss the cross-claims in interpleader of Title Service Company and R. H. Wallis (R. 2790-2793). On January 29, 1948, following the termination of the Conservator's appointment, a third so-called "cross-claim in interpleader", that of George Turner, was filed for a determination of the disposition of rentals owed by Turner on a lease from the Association which lease was listed in the "More Definite Statement" of May 29, 1946 (R. 3461). Two further so-called "interpleaders" were subsequently entertained by the court below in the consolidated actions—the first, a motion by the Association to impound notes, evidencing a loan from the San Francisco Bank to the Association during the conservatorship, to determine whether the obligations, if any, of the Association thereunder were owing to the Los Angeles or the San Francisco Bank (R. 3562, 8296); and the second, proceedings "in the nature of interpleader" to determine the extent of insurance premium liability of the Association to the Federal Savings and Loan Insurance Corporation (R. 6473, 8297).

Out-of-state service on nonresident appellants: The appellants Ammann and the Federal Home Loan Bank of San Francisco were personally served in the State of California (R. 41, 9506). Neither the defendant Fahey,

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[2] Judge Hall also did not accept the Government's assurance that no dissolution or merger of the Association was intended, and, on the basis of the plaintiffs' affidavits filed in support of the *ex parte* restraining order issued on May 27, 1946, found that such had been intended, and that counsel for the plaintiff-shareholders was entitled to an interim allowance of attorneys' fees for services, among others, in securing the District Court injunction which the Supreme Court dissolved (R. 2355-2366).

however, officially resident in the District of Columbia and individually resident in the State of Massachusetts (R. 2997), nor those substituted as parties defendant in their capacity as Board members (R. 2771, 2776, 4547-4548, 9532, 4610), likewise officially resident in the District of Columbia, were personally served in California (R. 75-76, 4610).

Service of the complaints in the consolidated actions, designated as *in rem* actions for the return of property located in the State of California, was made pursuant to order for service on nonresident defendants under former Section 118 of Title 28 U.S.C. (now Section 1655) (R. 65-68, 4340, 9502-9510). The Federal Savings and Loan Insurance Corporation, with headquarters in the District of Columbia and which neither maintains an office nor has any agent or representative in the State of California (R. 5301), also was served only in the District of Columbia pursuant to like order (R. 5357). Service of the so-called "cross-claims in interpleader" was made on the nonresident defendants purportedly pursuant to former Section 41 (26) of Title 28 U.S.C. (now Sections 1335, 1397, 2361) (R. 78-80, 445-446).

Appellants' answers and motions to dismiss: Pursuant to court order of June 6, 1948, answers of these appellants to all pleadings were filed on July 30, 1948 (R. 5056, 5063, 5073, 5102). The answers alleged, *inter alia,* that the District Court lacked jurisdiction both over the persons of the nonresident defendants, and of the subject matter of the actions, and that none of the complaints or cross-claims stated a claim for which relief could be granted. The same defense had also been promptly made on the institution of the litigation (R. 5308). Motions to dismiss by Home Loan Bank Board, its members and defendants Fahey, Ammann, and the Federal Home Loan Bank of San Francisco, and other defendants, filed on September 13, 1948 (R. 5308), were finally overruled on October 17, 1949 (R. 7959). The Federal Savings and Loan Insurance Corporation, served as nonresident defendant on September 20, 1948 (R. 5357, 5393), filed a motion

to dismiss on November 22, 1948 (R. 5468), which was overruled on October 17, 1949 (R. 7959), and filed an answer to all current pleadings on July 18 and August 7, 1949 (R. 6978, 7008, 7021, 7051).

B. *The Injunction on Appeal.*

On September 9, 1949, having received no monthly or annual report from the Association since the removal of the Conservator, the Home Loan Bank Board, by Order No. 2015, directed an investigation and hearing to be held to determine what appropriate administrative action, if any, should be taken, including the possible appointment of a receiver. (App. C, *infra,* p. 178).

The order provided in material part:

"WHEREAS it appears to the Home Loan Bank Board that:

1. The Long Beach Federal Savings and Loan Association, Long Beach, California, has failed to file the monthly and annual reports required by the Rules and Regulations for the Federal Savings and Loan System;

2. Said Association has failed and refused to furnish an affidavit of its president or secretary or other officer that, to the best of his knowledge and belief, the books of said Association correctly reflect the financial condition thereof, as required of all Federal savings and loan associations;

3. Said Association has failed to pay the premiums for insurance of its accounts and the installments thereon due and payable on or about June 5, 1948, December 5, 1948, and June 5, 1949, in the total amount of $36,487.25, in violation and disregard of the statutes of the United States, the Rules and Regulations for Insurance of Accounts, and its contract with the Federal Savings and Loan Insurance Corporation;

4. Said Association and its officers have committed and are committing other violations of law and regulations, including violations set out in the More Definite Statement submitted to said Association on May 29, 1946, and have pursued and are pursuing a course that is jeopardizing and injurious to the interests of its members, creditors, and the public;

"It Is Hereby Ordered, pursuant to the authority vested by law in the Home Loan Bank Board and pursuant to the Rules and Regulations for the Federal Savings and Loan System, that the Long Beach Federal Savings and Loan Association, Long Beach, California, appear at a hearing, as hereinafter provided, and show cause, if any it have, why the Home Loan Bank Board should not, for the reasons hereinbefore stated, enter its order or orders for such action as it deems necessary or appropriate, including the appointment of the Federal Savings and Loan Insurance Corporation as receiver for said Association;" (App. C, *infra,* p. 178).

On October 17, 1949, on motion of the plaintiff-shareholders (R. 7694), the cross-claimant Association (R. 7804), and cross-claimants in "interpleader" Title Service Company (R. 7659), R. H. Wallis (R. 8196), and George Turner (R. 7676), the court below restrained the holding of the Board hearing for ten days by *ex parte* order (R. 8328), which order was on October 28, 1949, extended for a further ten days (R. 8357), and after hearing on November 8 and 9, was ultimately continued by the preliminary injunction from which this appeal is taken (R. 8194). The findings in the injunction order, filed December 1, 1949 (R. 8537), were formulated at a separate *ex parte* hearing held on November 11, 1949, from which Government counsel was expressly excluded (R. 11174, 11176-11177), and at which all issues of fact and law bearing on the merits of the case were fully canvassed (R. 11178-11378).

C. *The Grounds Assigned for the Injunction on Appeal.*

In issuing the injunction, the court below held that it had jurisdiction over all persons and parties to the consolidated actions and of the subject matter thereof (R. 11146-11153); that the proposed administrative hearing, insofar as it related to the charges made in the "More Definite Statement" of May 29, 1946, involved the same matters as those at issue in the pending Mallonee action (R. 11157), and insofar as it related to the failure of the Association to file monthly and annual reports, was unwarranted because the filing of such reports would require

the Association to waive its claims for damages and other relief in the pending Mallonee action (R. 11153-11154, 11157-11158); that the holding of the administrative hearing would thus interfere with the court's jurisdiction, as well as with the enforcement of orders theretofore entered by the court in ancillary proceedings (R. 8263, 8271); and that if there were any legitimate grounds for complaint against the Association's management, the Board could file its complaint with the court and obtain from it any appropriate relief, including the appointment of a receiver or conservator (R. 8256, 11162).

In issuing the injunction the court found it "impossible" to state all of the issues which might be involved in the Mallonee action upon the ground, among others, that "the present posture of the case is not such as to permit a * * * clarification of the issues" (R. 8277). The matters involved in the complaint and cross-claims in the Mallonee action, however, and the prior orders and ancillary proceedings therein, on which the injunction was thus based, may be briefly summarized; no separate matters were alleged, or orders entered, in the Los Angeles action.

The matters involved in the complaints and cross-claims: The original complaint in the Mallonee action (R. 2) and Association cross-claim (R. 323) alleged that the statute and the rules and regulations, pursuant to which said Conservator was appointed, were unconstitutional; that there were no valid grounds for the appointment of a Conservator; that prior to the appointment of the Conservator, the defendant Fahey had been involved in a dispute with the then directors of the then Federal Home Loan Bank of Los Angeles concerning the appointment of a president of said Bank; that one T. A. Gregory, President of said Association, was a director of said Bank and active in said dispute; that to resolve the dispute the defendant Fahey, by three orders issued on March 29, 1946 (App. C, *infra,* p. 169), unlawfully dissolved the Bank of Los Angeles and transferred its assets to the Bank of Portland, reconstituted as the Bank of San Francisco, along with certain assets belonging to said Association then in the possession of the Bank of Los Angeles; that the Association and

Gregory intended to bring legal actions to recover the said assets of the Association and that a Congressional investigation was pending with respect to the dissolution of said Bank (R. 11-13, 340-344); and that, to prevent the bringing of said legal actions and holding of said Congressional hearing, and as retaliation against Gregory and "solely" by reason of "malice and ill will on the part of said defendants" against Gregory the defendant Fahey appointed defendant Ammann as Conservator for the Association (R. 16, 343-344).

The amended complaint (R. 2960) and cross-claims of the Association (R. 3188) filed in December 1947 and January 1948 and each consisting of seven separate counts, set forth substantially the same allegations, together with the general averment that the findings made by the defendant Fahey in the order appointing the Conservator and in the "More Definite Statement" were false and known to him to be false (R. 2977), and that the order was therefore "fraudulent" (R. 3011).

The complaint in the Mallonee action and Association cross-claim both proceeded on the avowed theory that, as the Conservator's appointment was illegal, each and every transaction of the Association during the conservatorship was "void, ab initio," and subject to challenge pending the outcome of the litigation testing the validity of the appointment (R. 3079, 3321). It was alleged that, on the appointment of the Conservator, withdrawals in excess of $6,000,000 of savings (share accounts) occurred (R. 311, 3220, 3246), and that thereupon the Association, during the conservatorship, borrowed a like amount from the San Francisco Bank, pledging as security therefor, aproximately $12,000,000 of the Association's notes and trust deeds on homes of 8,000 borrowers (R. 3224, 667-668, 3584-3586), thereby clouding the titles thereto; used the Association's funds to pay principal and interest to the Bank and to purchase shares therein (R. 4219, 4222, 4227, 4229); sold millions of dollars of the Association's United States Government bonds (R. 4197, 4199, 4201, 4204); and made $4,000,000 of "improvident" loans (R. 4174). Each

of these transactions allegedly gave rise to "controversies" which "were increasing multifold, both in number of parties, in the millions of dollars involved, and are snowballing in magnitude to the point of making extremely difficult a final settlement * * *" (R. 3310-3311).

Relief prayed for: The relief originally prayed for included the removal of the Conservator; the return of the Association's assets to its former management; the filing of a "detailed" statement or "accounting" describing the assets turned over to the Conservator on the date of his appointment and each of the Conservator's subsequent dealings therein (R. 22-23, 350-351); and a determination whether the Los Angeles Bank was lawfully dissolved (R. 300-301). As amended, the complaint and cross-claims further prayed for a judgment decreeing that all obligations incurred by the Association during the conservatorship, particularly the loan from the San Francisco Bank, and all transfers of the Association's property in pledge or otherwise during the same period, were null and void, and directing that all such property in the possession or control of the defendants be returned to the Association, or that, if any such property could not be so returned, the Association be awarded money damages against the defendants personally served within the local district in the amount of the highest value from the time the property was allegedly converted to the date of the trial (R. 3317). The Association's supplemental cross-claim, filed May 27, 1948, prayed for such damages without limitation to the property which could not be so returned or to the defendants thus served (R. 4161, 4167, *et seq.*).

The parties defendant: Conformably with these allegations, thousands of parties were named defendants, including 8,000 "John Doe Borrowers" from the Association; 100 "Intermeddling Does" dealing with the defendants Fahey and Ammann in the "handling or transfer" of the assets belonging to the Association or insuring titles to real property theretofore conveyed in trust to Title Service Company; 100 "John Doe Receivers" who allegedly had taken "or may take" real, personal or other prop-

erty from said defendants "without or with the payment of actual consideration therefor"; 100 "John Does", allegedly named as trustees under deeds of trust executed in favor of the Association since the Conservator's appointment, or who had accepted, or "may" accept, assignments of notes or other choses in action from said defendants; as well as hundreds of "John Does" and "Jane Does", "Roe and Doe" co-partnerships, "Black and Company" corporations, 1 to 100 inclusive, and "Red Associations", whose activities and dealings with the defendants are not specifically alleged in the complaint or cross-claims (R. 3002-3008, 3281-3288). From time to time, numerous parties included in one or other of these captions were specifically named as parties defendant.[3]

The ancillary proceedings and orders therein: On the same basis, individual business transactions between the Association and third parties during the conservatorship were challenged in ancillary proceedings, beginning with the filing of the cross-claim of the Title Service Company (R. 43). This company, organized by the management of the Association in 1935 without issued capital stock, with officers and directors substantially identical with those of the Association (R. 11087), was originally named in the shareholders' complaint as a "John Doe" defendant (R. 153). On June 5, 1946, as above stated, and thereafter from

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[3] Included among these were all past and present officers and directors of the Federal Home Loan Bank of San Francisco (R. 8207); the Federal Savings and Loan Insurance Corporation (R. 8197n); 10 savings and loan associations located in Northern California and the 80 officers and directors of said associations (R. 8197-8198n); Land Title Insurance Company, a corporation which allegedly undertook to insure titles of borrowers during the period of the conservatorship (R. 3038) (R. 2061); Newendorp and Bradley, shareholders of the Association who filed suit in the state courts of California against T. A. Gregory and other officers and directors of the Association for mismanagement and breach of trust (R. 3445-3446, 8385-8386); and, in connection with certain of the numerous motions filed by the plaintiff-shareholders and the Association and court orders issued pursuant thereto, all the 300 odd associations and other member financial institutions of the present Eleventh Federal Home Loan Bank District covering nine states and two territories (R. 8198n).

time to time, the Title Service Company filed so-called cross-claims in interpleader, alleging in substance that it had been named as trustee in 8,000 trust deeds securing loans made by the Association with a remaining balance of over $12,000,000, and that it was faced with conflicting demands, one from the Conservator requesting it to make reconveyance of title to borrowers on repayment of loans secured by said trust deeds, and the other by the defendant Association directing it not to make such reconveyance, and praying that the court adjudicate the rights of the adverse claimants (R. 53, 766, 995, 2305, 2581).

Any corporation undertaking to insure titles for borrowers willing to accept a reconveyance from the Conservator without concurrence of Title Service Company, was promptly made a party defendant.[4]

The court overruled motions to dismiss the Title Service Company cross-claim (R. 752, 2790-2793), and, borrowers desiring to obtain reconveyances of title on final repayment of loans from the Association were required to intervene in the Mallonee action and to deposit their final payment in the registry of the court (R. 8291-8293). The court orders authorizing the interventions directed the Conservator to deposit in court all sums paid by the borrower-intervenors during the conservatorship, after which the court directed delivery of the reconveyances of title theretofore deposited in the court by the Title Service Company (R. e.g. 2867). At least fifty such intervention proceedings were conducted in the Mallonee action (R. 8287).

The Conservator's protest that such procedure would tie up the Association's funds was unavailing (R. 10204). As of January, 1948, the total thus deposited in court amounted to approximately $1,600,000 (R. 8291), an amount substantially in excess of the total surplus and reserves of the Association at the time of the Conservator's appointment (R. 361). No interest was earned on any

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[4] The Land Title Insurance Company, which offered to insure title without regard to this alleged cloud on title, was promptly for this reason named a defendant and co-conspirator in the Mallonee action (R. 3033-3039).

part thereof and none of the amount thus deposited was available for use by the Conservator in current operation of the Association (R. 11456-11457).

On January 17, 1948, when the Association's working capital had been thus depleted, the Home Loan Bank Board issued Order No. 388, providing for the termination of the Conservator's appointment (R. 3404). Order No. 388 directed the Conservator to furnish a full accounting to the shareholders; the Board Regulations provided for a "detailed" report and review of the Conservator's "accounts" on termination of his appointment (App. B, *infra.* p. 161). A copy of the order and accounting was to be filed in court (R. 3404).

The Board decided that the termination should be effective upon the holding of a new election of directors by the Association shareholders (R. 10312), a condition authorized by regulation in the Board's discretion. (App. B, *infra,* p. 164) Judge Hall, however, decided that such election should be held only after the restoration of the former management, and on January 23, 1948, ordered the Conservator to return the Association to its former management and to file an accounting, with provision for a subsequent election of directors (R. 8310). Certain appeals theretofore taken by the former Conservator from orders in borrower-intervention proceedings, and from an order allowing attorneys fees, having thus become moot, were voluntarily dismissed (R. 3550). The accounting was filed on September 27, 1948 (R. 8235-8239).

New ancillary proceedings followed. Pursuant to an order dated March 13, 1948, sought and obtained by the cross-claimant Association, the Bank of San Francisco deposited in court the notes representing the loan in the unpaid balance of $6,300,000, theretofore advanced by the Bank to the Association represented by the former Conservator, together with trust deeds in the approximate amount of $12,000,000 and $5,000,000 of Government bonds assigned by said Conservator on behalf of the Association as collateral to secure repayment of the loan (R. 8194). This proceeding was treated as one of the "interpleaders"

on which the court below rested its jurisdiction over non-resident defendants (R. 8296).

Pursuant to further order of the court dated March 26, 1948, sought and obtained by the Association, the trust deeds thus deposited by the San Francisco Bank were returned to said Association and the Association pledged as collateral in lieu thereof the proceeds theretofore paid into court by the aforementioned borrowers, together with Government bonds in the amount of $5,300,000 (R. 8526). In so ordering, the court found that, notwithstanding the termination of the conservatorship, the trust deeds were still subject to conflicting claims of the San Francisco and former Los Angeles Banks, and that, as working capital was required in sufficient amounts for the operation of the Association, borrower-intervention proceedings and payment into court of loan repayments in connection therewith to clear the borrowers' title, should be discontinued (R. 8529). During the conservatorship, the court overruled the objection that the depletion of working capital in such collateral proceedings (totalling $1,600,000 in January, 1948) would hamper the Association's operations (R. 10204).

On July 6, 1948, the Association filed a petition for an order to show cause why the Federal Home Loan Bank of San Francisco should not be dissolved, on the ground that the holders of a majority of the shares owned by member (voting) associations (a minority of the total shares, the majority shares then being held by the Government (R. 7242)) either had voted or would vote to dissolve the Bank (R. 4552). A copy of the motion was served on every association member of the Bank throughout nine states and two territories of the Eleventh District (R. 4596). The court, after issuing a show cause order, has held its decision thereon in abeyance ever since, and assigned the pendency of the motion as one ground for issuing the injunction from which this appeal is taken (R. 8269, 8303).

In April 1949 the court permitted the plaintiff-shareholders and the Association to interplead $24,374.06, the amount of insurance premiums claimed by the Federal Savings

and Loan Insurance Corporation to be due it, an interpleader filed on the ground that nonpayment might render the association liable to the Insurance Corporation, while payment might render the Association's management liable to its shareholders (R. 6473). Several deposits of additional insurance premiums were thereafter made on the same theory (R. 6920, 8965). This is the fifth of the so-called interpleaders invoked as the basis for jurisdiction over the nonresident defendants (R. 8297). There has been no payment of insurance premiums by the Association since the removal of the former Conservator, although the Insurance Corporation is required by statute to insure every Federal savings and loan association (App. A, *infra,* p. 133) (12 U.S.C. 1724, 1726).

In May 1949, further supplemental pleadings and cross-claims were filed by the plaintiff-shareholders and the Association (R. 6736, 6798, 6850), against the Insurance Corporation and the Home Indemnity Company, the principal on the former Conservator's fidelity bond. These pleadings repeated the purported interpleader of insurance premiums, and added a claim for damages against the Insurance Corporation on the ground that its acceptance of insurance premiums from the former Conservator and continued insurance of the Association during the conservatorship, aided and abetted the unlawful operations of the Conservator (R. 6785).

Each of the above ancillary proceedings was assigned as among the grounds for issuance of the injunction on appeal (R. 8268-9, 8283-4, 8287-91, 8295-7).

As the ancillary proceedings progressed, negotiations ensued to determine whether the protracted litigation, which was thus "increasing multifold" and "snowballing in magnitude" (R. 3310), could be brought to an end by compromise and settlement (R. 10880-2). On motion of the Association, the court entered successive injunctions restraining any judicial and administrative proceedings which might impede a settlement on terms satisfactory to the parties, including the Association.

By order dated July 20, 1948, and on petition of the plaintiffs and cross-complainants in the Mallonee action, 10

of the association members of the Bank of San Francisco were enjoined from maintaining proceedings against the Bank in the Northern District of California, with reference to settlement negotiations (R. 4672), and were thereafter served as "Red Association" defendants (R. 4782, *et seq.*). By order dated February 2, 1949, the court remanded to a state court of California, for lack of Federal jurisdiction, a derivative action brought by H. L. Newendorp and C. E. Bradley, shareholders of the Long Beach Federal Savings and Loan Association, against T. A. Gregory and others based on alleged fraud and mismanagement (R. 5760). At the same time, however, the court enjoined the plaintiff-shareholders in that action from prosecuting the proceeding in the state court during the pendency of the Mallonee action. Newendorp and Bradley were named defendants in the Mallonee action (R. 3459).

On October 26, 1949, the Government, in response to court order, advised that the financial concessions to the Association, embodied in the Association's proposal for settlement and petition for compromise judgment, were not in the public interest and provided "no basis in principle for further negotiations" (R. 10880-2). In issuing the restrictive injunction against the Board, however, Judge Hall took into consideration his efforts to "keep the people in that climate" of "settlement" (R. 11154, 11155).

The 24 printed volumes of the record on appeal include the principal pleadings and some of the ancillary proceedings below. No date for trial has been set. Certain "speaking" motions must be disposed of before the case is "at issue" (R. 8257), and ruling thereon is being held in abeyance (R. 8257) pending completion of the Association's examination of all the books and records of the San Francisco Bank for the year 1943 to date, commenced in December 1948 (R. 8257), and now in progress (R. 11412, *et seq.*).

Pending completion of such examination the court below also postponed the time for filing of cross-interrogatories by plaintiffs and the Association in connection with the San Francisco Bank's taking of the deposition of defendant

Fahey (R. 11464), whose alleged motives in issuing the orders of March 29, 1946 and May 20, 1946 are the basis of the Mallonee action. Mr. Fahey, as the court was then advised, suffered from disabilities due to age and illness (R. 8259-61n). On November 19, 1950, we regret to advise the Court, Mr. Fahey died.

QUESTIONS PRESENTED

1) Whether, consistently with the policy of the Home Owners' Loan Act, each and every contract made, transfer executed, or other act performed, by the Conservator before the termination of his appointment, may be collaterally attacked in a proceeding to set aside each such act as void or to recover from appellants damages allegedly caused thereby (or by the appointment), upon the allegation that the charges made in the order of appointment were knowingly false.

2) Whether an action for such relief is barred by failure to exhaust the administrative remedy.

3) Whether the findings made by the Federal Home Loan Bank Administration in issuing the orders of March 29, 1946, which dissolved the Los Angeles Bank, are subject to judicial review.

4) Whether either the former Bank of Los Angeles or its association members have any standing to question the validity of the orders of March 29, 1946.

5) Whether the members of the Home Loan Bank Board are indispensable parties defendant to an action to set aside the orders of March 29, 1946.

6) Whether out-of-state service in the consolidated actions may be made on the members of the Home Loan Bank Board and other non-resident appellants under either Section 1655 or Section 2361 of Title 28 U.S.C., and whether either section authorizes an injunction, an award of money damages, or other judgment *in personam* against said appellants.

7) Whether there is any basis in the record for the is-

suance of an injunction to restrain the holding of an administrative hearing pursuant to Board Order No. 2015.[5]

SPECIFICATIONS OF ERRORS TO BE URGED

The District Court erred:

1. In issuing its order enjoining the Home Loan Bank Board from conducting an administrative hearing pursuant to Board Order No. 2015 or from initiating any other proceeding as defined in said order, and enjoining all parties to the proceeding below from participating therein.

2. In holding that it had jurisdiction over the subject matter of the complaints and cross-claims, and of the parties thereto, in the consolidated actions in which the injunction was issued.

3. In holding that an action may be maintained to set aside each and every act of the Conservator performed before the termination of his appointment.

4. In failing to hold that an action to obtain such relief is barred by failure to exhaust the administrative remedy.

5. In failing to hold that the order appointing the Conservator is not subject to judicial review on any of the alleged grounds in the consolidated actions or that, if it is, the order is valid.

6. In failing to hold that the orders of March 29, 1946, which dissolved the Los Angeles Bank, are not subject to judicial review.

7. In failing to hold that neither the former Los Angeles

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[5] Subsidiary questions presented are:

8) Whether the order of the Federal Home Loan Bank Administration of May 20, 1946, appointing the Conservator, is subject to judicial review on any of the grounds alleged in the Mallonee action, and, if so, whether the order is valid as a matter of law on the admitted facts.

9) Whether the complaints or cross-claims in the consolidated actions contain any allegations negating the presumed existence of facts sufficient to warrant the findings made by the Administration in issuing the orders of March 29, 1946.

10) Whether the consolidated actions, insofar as they seek to set aside the orders of March 29, 1946, as well as certain so-called cross-claims in interpleader or petitions in the nature thereof, are unconsented suits against the United States.

Bank nor its association members have any standing to question the validity of the orders of March 29, 1946.

8. In failing to hold that the members of the Home Loan Bank Board are indispensable parties defendant to an action to set aside the orders of March 29, 1946.

9. In failing to hold that the consolidated actions, and complaints and cross-claims therein, constitute unconsented suits against the United States.

10. In holding that the Administrative Procedure Act confers jurisdiction to review the order of May 20, 1946, appointing the Conservator and the orders of March 29, 1946, which dissolved the Los Angeles Bank.

11. In holding that an administrative hearing, pursuant to Board Order No. 2015, or the initiation of any other proceeding as defined in the decree of injunction, would interfere with the District Court's asserted jurisdiction in the consolidated actions.

12. In holding that Sections 1655 and 2361 of Title 28 U.S.C. authorize out-of-state service on the members of the Home Loan Bank Board and on other non-resident appellants and the entry of a judgment *in personam* against said appellants, awarding money damages, setting aside each and every act of the Conservator, and subjecting them to a decree of injunction.

13. In entering its findings of fact and conclusions of law, other than findings 4-8, 10-14, 16, 17, 19, 20, 24-29, 44, 58, 73, 76, and (insofar as it concerns the termination of the conservatorship) 78, in that said findings and conclusions other than those specified by number, are without any support in the evidence or are erroneous as a matter of law.

14. In entering its findings of fact, 62, in that none of the orders entered in the consolidated actions are res judicata or the law of the case on any material issue.

15. In failing to receive in evidence the appellants' Exhibits A, B, and C (R. 11045-11048, 11052-11055, 11059, 11076).

16. In excluding counsel for appellants from the hearing held on November 11, 1949.

STATUTES, REGULATIONS, AND ADMINISTRATIVE ORDERS HEREIN INVOLVED

The pertinent statutes, regulations, and orders herein involved are set forth in Appendices A, B, and C, respectively, *infra,* pp. 114 to 180. A brief summary of the statutes and regulations and the Federal Home Loan Bank System created thereby is here set forth for the convenience of the court.

THE FEDERAL HOME LOAN BANKS

Under Section 3 of the Federal Home Loan Bank Act, as amended (12 U.S.C. 1423), the Home Loan Bank Board, constituted under Section 17 of the Act, is required to divide the United States into not less than eight nor more than twelve districts, with due regard to the "convenience and customary course of business of institutions eligible to and likely to subscribe for stock of a Bank"; the districts thus created may be readjusted, and new districts may from time to time be created by the Board, not to exceed twelve in all; and the Board is required to establish in each district one Federal Home Loan Bank whose title includes the name of the city in which it is located.

Under Section 4 of the Act (12 U.S.C. 1424), savings and home-financing institutions throughout the United States are eligible for membership in one of the Federal Home Loan Banks.

Section 6 of the Act (12 U.S.C. 1426) makes provision for subscription to the capital stock of each Bank by members and, as to all stock not subscribed for by members, by the United States, with further provision for retirement of the capital subscribed by the Government after the amount paid in by members equals that paid in by the United States.

The management and financial operations of each of the Banks are subject to the close supervision and direction of the Home Loan Bank Board. Under Section 7 of the Act (12 U.S.C. 1427), four of the twelve directors of each Bank are appointed by the Board. The remaining eight directors of the Bank, divided into four categories of two each, are elected under the supervision of the Board. Two

of these eight directors are elected at large by all member financial institutions casting one vote each; the others are elected by member institutions divided into three size groups, each entitled to elect two directors. Voting has no relationship to the amount of stock owned.

In the Eleventh, as in the former Twelfth, District, each state must be represented by at least one elective director (see, *infra,* p. 99); by virtue of Board Order No. 5082, the States of Arizona and Nevada together constitute one state for this purpose. As the readjusted Eleventh District includes nine states, neither the State of California nor any other state may have more than one elective director consistently with the rights of the other states. The former Twelfth District contained only three states (App. C, *infra,* p. 171).

Eligible institutions may become members of, or apply for advances from, only the Federal Home Loan Bank of the District in which is located the institution's principal place of business or, with the approval of the Board, the Bank of an adjoining District (Sec. 4(b), 12 U.S.C. 1424). The Bank may deny such application or, subject to the approval of the Board, grant it on such conditions as the Bank may prescribe (12 U.S.C. 1429;).

Under Section 11 of the Act (12 U.S.C. 1431) the funds which the regional reserve banks make available to their respective members are obtained principally from the proceeds of obligations issued by the Board, which obligations become the joint and several obligations of each Bank regardless of whether or not that Bank consents to the issue. The Board may require any Federal Home Loan Bank, when in the Board's judgment an emergency exists, on such terms and conditions as the Board prescribes, to rediscount notes of members held by another District Bank, or to lend to or make deposits with such other Bank, or to purchase obligations of the other Bank (12 U.S.C. 1431(f)).

Under Section 12 of the Act (12 U.S.C. 1432), the selection, employment, and compensation of all officers, employees, attorneys and agents of each of these regional Banks are subject to the approval of the Board, and all powers

granted to each Bank are exercised and enjoyed "subject to the approval of the Board".

Provision is also made for dissolution of any Bank, should the Board determine such Bank is not required to carry out the purposes of the Act. Under Section 25 of the Act (12 U.S.C. 1445), each Federal Home Loan Bank is given succession "until dissolved by the Board" or by further Act of Congress. Under Section 26 (12 U.S.C. 1446), "whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action," it may "liquidate or reorganize" any Bank and in the case of any such reorganization, any other District Bank may, with the approval of the Board, acquire the assets of any such liquidated Bank and assume the liability thereof, in whole or in part.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, by Section 5 of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. 1464), to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. The Secretary of the Treasury and the Home Owners' Loan Corporation are authorized and directed to invest in shares (savings accounts) of any association, as directed by the Board, in an amount up to 75% of the total investment by the Secretary or the corporation and the other shareholders in such association. (Secs. 4(n), 5(j), 12 U.S.C. 1463(n) and 1464(j)). Section 5(d) of the Act (12 U.S.C. 1464(d)) provides that the Board shall have full power to provide in its rules and regulations for "the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the

same; and to release any such association from such control and permit its further operation."

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

It is the duty of the defendant Federal Savings and Loan Insurance Corporation under Title IV of the National Housing Act, as amended (12 U.S.C. 1724-1730; App. A, *infra,* p. 133), to insure the share accounts of all Federal savings and loan associations. The Federal Savings and Loan Insurance Corporation may and does also insure certain accounts of selected State-chartered savings and loan associations.

SUMMARY OF ARGUMENT

The injunction should be reversed because the complaints and cross-claims in the consolidated actions in which it was issued state no claim for relief within the jurisdiction of the Federal courts, as well as because of the absence of the necessary bases for the issuance of a preliminary injunction. On appeal from a preliminary injunction "the jurisdiction of the court below," the "equity of the complaint, the relief granted and all other issues are before" the appellate court. *Orth* v. *Transit Inv. Corporation,* 132 F. 2d 938, 944 (3d Cir.); see *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282, 287.

I

None of the matters remaining for determination in the Mallonee action, insofar as the action relates to the validity of the conservatorship, constitute a claim for relief within the jurisdiction of the court below. The remaining objects of the Mallonee action, following the termination of the Conservator's appointment in 1948, are to nullify each and every act of the Conservator and to recover damages allegedly caused thereby or by his appointment. The action is plainly not maintainable for such purpose.

A. The Federal Home Loan Bank Administration was duly vested with jurisdiction to determine whether a Conservator should be appointed. *Fahey* v. *Mallonee,* 332 U. S. 245; *Adams* v. *Nagle,* 303 U. S. 532. The order appointing the Conservator was therefore valid until duly set aside,

and cannot be questioned on any ground, including "fraud", by a collateral attack on the individual transactions of the Conservator in the operation of the Association. The order of appointment can be challenged, if at all, only in litigation directly attacking the order of appointment, and it would be "intolerable" if "every" action of the Conservator could be suspended to "await the outcome of [that] litigation." *Adams* v. *Nagle,* 303 U. S. 532, 540, 544. On the termination of the appointment no action is maintainable, moreover, to recover damages allegedly caused by the appointment or by the Conservator's operations, even though it is claimed that the appointment was made on grounds "knowingly false". For "it is impossible to know whether the claim is well founded until the case has been tried, and * * * to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties". *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2d Cir.). The further relief demanded, the invalidation of the loan from the San Francisco Bank and other business transactions of the Association during the conservatorship, calculated as it is to dissuade any central bank or private party from dealing with a conservator pending litigation testing the validity of the appointment, is an "intolerable" interference with the policy of the Home Owners' Loan Act. *Adams* v. *Nagle, supra.*

B. The Mallonee action is not maintainable to obtain such relief for the further reason that the Association and its shareholders failed to exhaust their administrative remedies. The Board's regulations provided for an administrative hearing to determine whether the Conservator should have been appointed or should be continued in office. The plaintiffs first procured the injunction and thereafter the deferment of the administrative hearing throughout the nineteen months of the conservatorship. They cannot now be heard to complain of any injury allegedly caused by the appointment of the Conservator or his operations. The administrative remedy, though provided by regulation

rather than by statute, must first be exhausted because the need for resorting to the courts might thereby be obviated and because the question whether there was cause for appointing or continuing a conservator in office is initially for administrative decision and not for the independent determination of the courts. "To hold otherwise would be in effect to substitute the determination of the court for the determination which * * * should be made by" the administrative agency. *Red River Broadcasting Co.* v. *Federal C. Commission,* 98 F. 2d 282, 287.

The fact that the Conservator was appointed in advance of an administrative hearing provides no excuse for failure to exhaust the administrative remedy. A temporary conservatorship pending hearing on the Board's charges was validly authorized to insure interim protection to the Association, and may not, therefore, be stayed. *Fahey* v. *Mallonee,* 332 U.S. 245, 257; *Yakus* v. *United States,* 321 U.S. 414, 439-441. Moreover, any damages alleged were susceptible of administrative correction. *Utley* v. *St. Petersburg,* 292 U.S. 106, 109; *Lichter* v. *United States,* 334 U.S. 742, 793-4.

C. The order appointing the Conservator is not subject to judicial review on any of the grounds alleged in the complaint but if subject to such review, is valid as a matter of law on the admitted facts. In appointing the Conservator the Administration charged, and the plaintiffs admit, that the directors of the Association had attempted to convert their share accounts into 21,000 one-dollar shares, approximately 10% of the maximum potential votes of members, sufficient to exercise practical voting control and to perpetuate themselves in office. These acts were in plain violation of the directors' fiduciary obligations, as well as of the provisions of the Association's Charter.

The Administration also charged that the directors had by resolution voted the appropriation of $100,000 of the Association's funds to defend against supervisory action a resolution admittedly intended to defend against the appointment of a Conservator because of allegedly unwarranted charges of misconduct by the Association's management. The appropriation of the Associa-

tion's funds to defend against such charges of personal misconduct by the Association's management was wholly illegal.

These two charges alone warranted the Conservator's appointment. Whether the other grounds assigned in the order of appointment were supported in fact or were known to be without foundation is immaterial. For "if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it". *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 145.

D. The action in any event is clearly not maintainable against the members of the Home Loan Bank Board and the other non-resident appellants who were not personally served in the State of California. Even when originally instituted to secure the removal of the Conservator and the return of the Association's assets to the Association's private management, the Mallonee action was not one to enforce a claim to specific local property or otherwise within the coverage of Section 1655 of Title 28 U.S.C. so as to authorize out-of-state service on non-residents. Certainly that section, however, does not authorize any judgment *in personam,* following the termination of the conservatorship, against non-residents thus served, whether for money damages, to nullify contracts previously entered into during the conservatorship, or for other personal relief.

Nor can authority to enter judgment against the non-resident defendants be derived from Sections 1335 or 2361 of Title 28 U.S.C. These sections authorize out-of-state service on non-residents in certain interpleader actions, within the limitations therein defined, but none of the so-called cross-claims or petitions in the nature of interpleader in the Mallonee action possess the requisites prescribed by Sections 1335 and 2361 for out-of-state service. None of the cross-claims or petitions state a claim in interpleader. The Board members, moreover, are in no event "adverse claimants" within the meaning of the interpleader statutes, but if they are, their claims, if any, are asserted in their official capacities only and the interpleader actions are therefore unconsented suits against the United States. Con-

sent to such suit has not been given by the Administrative Procedure Act.

II

Both the complaint in the Los Angeles case and the complaint and Association cross-claim in the Mallonee action challenge the validity of the orders of March 29, 1946, which, *inter alia,* dissolved the Los Angeles Bank and transferred its assets to the San Francisco Bank. The allegations of the consolidated actions insofar as they relate to the orders of March 29, 1946, however, fail to state a claim, in this aspect, within the jurisdiction of the court below.

A. The orders were entered on a finding made under Section 26 of the Federal Home Loan Bank Act that the "efficient and economical accomplishment of the purposes of this Act will be aided by such action". This finding is not subject to judicial review. The Act makes no provision for such review, and, as the economic and other intangible factors which must be considered in making such findings are "not entirely susceptible of proof or disproof" (*Williamsport Wire Rope Co.* v. *United States,* 277 U.S. 551, 559) and "involve large elements of prophecy" (*Chicago & S. Air Lines* v. *Waterman S. S. Corp.,* 333 U.S. 103, 111), the Congress presumably intended to commit the determination to the sole and final discretion of the Board.

B. Neither the former Los Angeles Bank nor its association members have any standing to question the validity of the orders of March 29, 1946. The Federal Home Loan Bank Act, under which the Los Angeles Bank was created, expressly provides that Banks chartered thereunder should have succession "until dissolved by the Board" (Section 25) and authorizes the liquidation of any Bank "whenever the Board finds" that the "efficient and economical accomplishment of the purposes of this Act will be aided by such action" (Section 26). These provisions and the purposes of the Act plainly indicate that the corporate existence conferred on the Bank was not intended "to create a statutory privilege protected by judicial remedies". *Stark* v. *Wickard,* 321 U.S. 288, 300.

C. The Home Loan Bank Board members are indispensable parties to the granting of the relief prayed in the Los Angeles action and, insofar as it relates to the orders of March 29, 1946, in the Mallonee action. In the view most favorable to the Los Angeles Bank, the present action is one to continue in force a contract—the charter issued by the Board to the Bank—an action which cannot be maintained in the absence of one party to the contract. The Board is an indispensable party for the further reason that the Banks created under the Act can act only "with the approval of the Board", and the Los Angeles Bank cannot, therefore, secure the return of the assets previously transferred to the San Francisco Bank or resume its operations without the Board's affirmative approval. The relief sought, therefore, could not be granted save by an order directed against the Board members. *Daggs* v. *Klein,* 169 F. 2d 174 (9th Cir.).

The Board members have not been duly served. The action to continue in force an alleged contract, the charter of the Los Angeles Bank, is not maintainable under Section 1655 of Title 28 U.S.C. against non-residents not personally served, and in no event at the claimed domicile of the obligee, the Los Angeles Bank. Moreover, that section certainly does not authorize a judgment *in personam* against the non-resident Board members directing them to approve the return of assets to the Los Angeles Bank and the resumption of the Bank's operations.

D. The action is also an unconsented suit against the United States for the further reason that the relief prayed for requires affirmative action by the Board to approve the resumption of operation by the Los Angeles Bank. *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682. This conclusion is unaffected by the Administrative Procedure Act which, in general, was intended to codify the long established rules as to the scope of judicial review and was never intended to abrogate the historic immunity of the United States from unconsented suit.

III

The injunction should not have issued, regardless of whether the court below had jurisdiction of the subject matter and the parties to the consolidated actions in which the injunction was issued. Whatever may be said of the relief demanded in the consolidated actions, an injunction to restrain the Home Loan Bank Board members from conducting a hearing is strictly *in personam* and may not be issued in the absence of personal service on the Board members sought to be restrained. *Chase Nat. Bank* v. *Norwalk,* 291 U.S. 431, 435, 436-8; *Scott* v. *Donald,* 165 U.S. 107, 117. Further, the issuance of the injunction was erroneous because the proposed Board hearing and the objects thereof were not the same as those of the consolidated actions and the conduct of the administrative hearing therefore could in no wise interfere with the asserted jurisdiction of the court below in the consolidated actions (*Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 447; *Long* v. *Stites,* 63 F. 2d 855); because the court below improperly assumed supervisory powers of Federal savings and loan associations reserved to the Home Loan Bank Board; and because there is no showing of any irreparable injury to the appellees. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41.

ARGUMENT

The Mallonee action, insofar as it relates to the validity of the Conservator's appointment, should be dismissed, as we show in Point I. The consolidated actions, insofar as they relate to the validity of the orders of March 29, 1946, which dissolved the Los Angeles Bank, should also be dismissed, as we show in Point II.

The injunction on appeal must accordingly be reversed for the reason that neither the complaints nor the cross-claims in the consolidated actions in which the injunction was issued may be maintained. A preliminary injunction may not stand if the action in which the injunction was issued is itself not maintainable. On appeal from a preliminary injunction, "the jurisdiction of the court below,"

the "equity of the complaint, the relief granted and all other issues are before" the appellate court. *Orth* v. *Transit Inv. Corporation,* 132 F. 2d 938, 944 (3d Cir); *Re Tampa Suburban R. Co.,* 168 U. S. 583; *Meccano* v. *Wanamaker,* 253 U. S. 136; *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282; *Seattle Electric Co.* v. *Seattle., R. & S. Ry. Co.,* 185 Fed. 365 (9th Cir.).

In addition to the foregoing, the injunction should be reversed because of the absence of the necessary bases for the issuance of an interlocutory injunction, as we show in *infra,* Point III.

I

The Allegations of the Mallonee Action, Insofar as They Relate to the Validity of the Conservator's Appointment, Do Not State a Claim for Relief Within the Jurisdiction of the Court Below.

Prior to the termination of the conservatorship, the Mallonee action sought: first, to remove the Conservator; second, to obtain a "detailed" statement or accounting of the assets of the Association turned over to the Conservator on his appointment, and of the transactions of the Association in such assets during the conservatorship; third, to declare null and void each and every business dealing of the Association during the conservatorship, particularly the loan from the San Francisco Bank and the pledge of notes and trust deeds of Association as security therefor; and finally, to obtain either the return of the Asciation's assets transferred to others during the conservatorship or money damages for the alleged conversion thereof.

The first of these objectives is no longer a matter in controversy. By Order No. 388 (App. C, *infra* p. 177) (R. 3404), dated January 17, 1948, the Home Loan Bank Board provided for the termination of the appointment of the Conservator and by order entered on January 23, 1948, the Conservator was removed by the court below (R. 8310). The order of January 23, 1948, insofar as it terminated the

conservatorship, was final, and, no appeal having been filed within the time allowed, the propriety thereof is no longer open for consideration.[4]

The short answer to the remaining claims for relief is that all are barred because of the Association's failure to exhaust its administrative remedy, as we show in Point I, B below (see *infra,* p. 54), and because the order appointing the Conservator is not subject to judicial review on any of the grounds alleged, but if subject to such review, is valid as a matter of law on the admitted facts, as we show in Point I, C below (see *infra,* p. 59).

In the circumstances of this case, however, there is another and even more fundamental objection to the Association's remaining claims. As we show in Point I, A (see *infra,* p. 36), the validity of a Conservator's appointment cannot be questioned on any ground, including "fraud," by a collateral attack on the individual transactions of the Conservator in the operation of an Association. For related reasons of policy, as we show in Point I, A, 2 (*infra* p. 42), no action is maintainable to recover damages allegedly caused by the appointment or by the Conservator's operations. Granting of the further relief

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[4] The court order of January 23, 1948, which transferred the management to the former directors of the Association, was entered in a collateral proceeding on a petition for "an order of Court approving, confirming and interpreting" Board Order No. 388. (R. 10304) Accordingly, the court order transferring management and terminating the conservatorship effective January 24, 1948, was final and appealable when entered on January 23, 1948, although the accompanying order for an accounting was interlocutory. *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120; *Bank of Lewisburg* v. *Sheffey,* 140 U. S. 445. As Mr. Justice Frankfurter stated in *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68:

> "* * * For related reasons, an order decreeing immediate transfer of possession of physical property is final for purposes of review even though an accounting for profits is to follow. In such cases the accounting is deemed a severed controversy and not part of the main case. * * *"

demanded, the invalidation of the loan from the San Francisco Bank and other business transactions of the Association during the conservatorship would likewise be an "intolerable" interference with the policy of the Home Owners' Loan Act, as shown in Point I, A, 3 (*infra,* p. 50). *Adams* v. *Nagle,* 303 M.S. 532, 540.

These principles were consistently disregarded in the court below, first by the successive filing of a multitude of collateral proceedings, thereby impeding the proper operation of the Association during the conservatorship, and ultimately rendering its continuance a practical impossibility, and secondly, after the termination of the Conservator's appointment, by harassing the Government defendants in a succession of additional ancillary proceedings and by confronting them with enormous damage claims, as a means of inducing the Government to acquiesce in a "compromise" awarding large financial concessions to the Association.

As to the nonresident defendants, Fahey, the substituted Home Loan Bank Board members and the Federal Savings and Loan Insurance Corporation, there is another equally fatal objection, namely, that the court below lacked jurisdiction over their persons, as we show in Point I, D, (*infra,* p. 71).

A

THE ORDER APPOINTING THE CONSERVATOR IS VALID UNTIL DULY SET ASIDE, AND MAY NOT BE QUESTIONED IN COLLATERAL PROCEEDINGS ATTACKING THE INDIVIDUAL TRANSACTIONS OF THE CONSERVATOR PENDING THE DETERMINATION OF THE VALIDITY OF THE APPOINTMENT; ON TERMINATION OF THE CONSERVATORSHIP NO ACTION IS MAINTAINABLE TO INVALIDATE SUCH INDIVIDUAL TRANSACTIONS OR TO RECOVER DAMAGES ALLEGEDLY CAUSED BY THE APPOINTMENT OR OPERATIONS THEREUNDER

1. *The order appointing the Conservator is valid until duly set aside, and may not be questioned in collateral proceedings attacking the individual transactions of the Con-*

servator pending the determination of the validity of the appointment.

The order of appointment was made within the scope of the Commissioner's official authority. The Home Loan Bank Board was duly invested by Congress with jurisdiction to decide whether a Conservator should be appointed. Section 5(d) of the Home Owners' Loan Act of 1933 (12 U. S. C. 1464 (d)) provides:

> "The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

On May 20, 1946, the date of the Conservator's appointment, the authority thus conferred was duly vested by virtue of Executive Order No. 9070 (App. A, *infra,* p. 140) in the Federal Home Loan Bank Administration, of which the defendant John H. Fahey was at all times Commissioner. Regulations governing the appointment of the Conservator were duly issued by the Commissioner from time to time. 8 Fed. Reg. 1182; 11 Fed. Reg. 5473. In *Fahey* v. *Mallonee,* 332 U. S. 245, the Supreme Court sustained the validity of the statute and the regulations issued pursuant thereto, a decision which "settled" the "status" of defendant Ammann as Conservator. *Ex parte Fahey,* 332 U. S. 258.

Having thus been issued on a determination made pursuant to valid statutory authority, the order of May 20, 1946, appointing the Conservator was not void *ab initio* but was valid and enforceable until duly set aside or terminated. Administrative orders issued in the exercise of such authority are valid until "set aside" in an "appropriate judicial proceeding" or terminated by "subsequent order" of the administrative agency. *United States* v. *Corrick,* 298 U. S. 435, 440; *United States* v.

Vacuum Oil Co., 158 Fed. 536 (D. C. W. D. N. Y.) and *Lehigh Valley R. Co.* v. *United States,* 188 Fed. 879 (3d Cir.) both approved in *Yakus* v. *United States,* 321 U. S. 414; *Falbo* v. *United States,* 320 U. S. 549, 553; *Ex parte Romano,* 251 Fed. 762, 764 (D. C. Mass.). Such is the rule specifically applicable to orders of the Comptroller of the Currency appointing receivers of national banks and, by analogy, to appointments of conservators under the Home Owners' Loan Act of 1933. *Adams* v. *Nagle,* 303 U. S. 532. On the authority of *Adams* v. *Nagle,* the Supreme Court recently "rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so" *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 695. Save for the two day interval between the order of the three-judge District Court entered September 30, 1946, (R. 743) and the operation of the stay thereof on October 2, 1946, (R. 762) pending appeal to the Supreme Court, the order appointing the Conservator was never set aside until terminated pursuant to Board Order No. 388 of January 17, 1948.

Where orders appointing a Conservator are concerned, moreover, the "appropriate proceedings" to contest the validity of the order are narrowly circumscribed to prevent an "intolerable" conflict with the policy of the applicable legislation. *Adams* v. *Nagle,* supra. The Conservator's authority with respect to any individual transaction may not be attacked on any ground, including "fraud," pending the outcome of litigation concerning the validity of the Conservator's appointment. Such attacks on individual transactions are deemed "collateral" and not maintainable. *Adams* v. *Nagle, supra.*

In *Adams* v. *Nagle, supra,* stockholders sued to enjoin the receiver of two national banks from enforcing assessments ordered by the Comptroller of the Currency. The complaints accused the Comptroller of the Currency of arbitrary conduct and fraud in directing that transfers under a bank consolidation be disregarded and in appointing the receiver, all without hearing. The Court held that the

Comptroller's decision appointing the receiver could not be attacked in a collateral proceeding and that the appointment was valid and enforceable until duly set aside.

In his opinion, Mr. Justice Roberts stated (303 U. S. at 540, 544):

> "In establishing the national banking system Congress has invested the Comptroller, an administrative officer, with jurisdiction to appoint a receiver after investigation and a finding that a bank has became insolvent, and to order an assessment up to one hundred per cent of the par value of the stock against the shareholders to pay creditors' claims if, upon an investigation, he finds that the assets are insufficient to pay the debts. Plainly these are questions for the exercise of administrative discretion. The necessity for vesting this power in an administrative officer springs from the *desirability of prompt liquidation.* It would be *intolerable* if the Comptroller's decision could be *attacked collaterally in every* suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done. * * *
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> *"If the Comptroller's decision with respect to the contract of February 17 was erroneous as matter of law the stockholders may or may not have a remedy.* But their remedy is not to attack, or seek to evade payment of, the assessment. *The collection of the assessment cannot be made to await the outcome of litigation of that question.* * * *" (Italics supplied)

The decision in *Adams* v. *Nagle, supra,* merely reaffirmed the settled doctrine in the Federal Courts. *Kennedy* v. *Gibson,* 8 Wall. 498, 505; *Casey* v. *Galli,* 94 U. S. 673, 681. The decisions of the Comptroller of the Currency, it has consistently been held, are "impervious to collateral attack" on any ground. *Deweese* v. *Smith,* 106 Fed. 438, 445 (8th Cir.); *Myers* v. *Coffey,* 124 F. 2d 396 (6th Cir.); *Barbour* v. *Thomas,* 86 F. 2d 510 (6th Cir.);

Schram v. *Schwartz,* 68 F. 2d 699, 702 (2d Cir.); *First Nat. Bank* v. *Murray,* 212 Fed. 140 (8th Cir.); *United States Nat. Bank of La Grande* v. *Pole,* 2 F. Supp. 153, 157 (D. C. Oreg.).[5]

The prohibition against collateral attack on orders of the Comptroller of the Currency, is not founded on any mechanical formula. As has aptly been stated, where administrative orders are concerned "A collateral attack can be defined only empirically, namely, as an attempt to impeach an administrative decision on grounds which, under the applicable judge-made * * * law, cannot be relied on for this purpose in the particular proceeding." 42 Am. Jur. 519. Attacks on the validity of the Comptroller's decisions in "every suit by a receiver" have been held "collateral", and hence not permissible, because such attacks would defeat the statutory policy of "prompt liquidation". *Adams* v. *Nagle,* 303 U. S. at 540.

In the light of the policy of the Home Owners' Loan Act of 1933, like attacks on individual transactions of the Conservator before his appointment is terminated or duly set aside, must likewise be deemed "collateral" and not maintainable. The policy of this Act, insofar as it authorizes the appointment of a "conservator", is to make possible the continued operation of an Association as a going concern pending the correction of the conditions which prompted the appointment of the Conservator. In the light of this policy, it is obviously "intolerable"

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[5] In the *Deweese* case, the court said (*loc. cit. supra*) that decisions of the Comptroller are "impervious to collateral attack, and open to avoidance by the court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake." These grounds for "direct attack" are "too broad" (see *Adams* v. *Nagle, supra* at 541; see Point I, C, *infra,* p. 59), but the prohibition against "collateral attack" was expressly approved in *Adams* v. *Nagle.* In the *Pole* case, the court said that such decisions are "not subject to collateral attack under any circumstances" (2 F. Supp. 153, 157). In *Davis Trust Co.* v. *Hardee,* 85 F. (2d) 571, 573 (D.C. Cir.), the court held that the decision of the Comptroller is "final, and is not subject to collateral attack or open to review except for fraud."

that the Conservator be required to litigate his authority in connection with every business transaction of the Association pending the outcome of litigation testing the validity of his appointment. *Adams* v. *Nagle, supra.*

Such, however, was precisely the object and effect of the Mallonee action and the ancillary proceedings entertained therein. The essence of the Mallonee action is the complaint that the appointment of the Conservator, while seemingly valid, was the result of an underlying secret fraud. But this complaint is not made in a suit directed solely at the legality of the appointment; it is made by the Title Service Company questioning the Conservator's demand for a re-conveyance of title (R. 43); by Wallis asserting a claim to a check (R. 86); by Turner, holding property owned by the Association, under a lease which the Conservator sought to terminate (R. 3961); in a suit by the Association against the Insurance Corporation over the amount of premiums due to the latter (R. 6466, 6473, 6663-6686, 6759-6790); and in an attempt to draw in question loans secured from the San Francisco Bank and the pledge of collateral therefor, solely on the ground that the Conservator had no valid appointment from the Board. For this consequential injury, the Association now seeks huge damages. On account of the litigation they have created, the Association refuses to pay insurance premiums due to the Federal Savings and Loan Insurance Corporation,[6] and claims an inability to report on the condition of the Association, as required by law. The District Court has not only entertained these claims; it has granted interim relief upon the basis of these claims, including the impound of the final payments due on mortgages (R. 2861 e. g.), and the imposition of the intervention procedure to re-convey property (R. 2519 e. g.); the impound of the collateral for the San Francisco Bank loan (R. 8194), and the issuance of the preliminary injunction involved in this appeal. The impound of mortgage pay-

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[6] As above set forth (*supra*, p. 18) the Association has paid certain sums into the court in an attempt to interplead the Association's shareholders and the Insurance Corporation.

ments paralyzed the conservatorship, the impound of collateral has embarrassed the Bank, and the injunction order has ousted the Board of its statutory powers.

The claims and demands thus asserted in the Mallonee action are predicated, and could only be predicated, on the avowed theory that each and every act of the Conservator was "void, *ab initio*" (R. 3079, 3321). As this theory is plainly erroneous, all the remaining claims for damages and other relief are plainly without basis in law, and for this reason and those set forth in the succeeding sections, should be dismissed.

2. *No action may be maintained upon the termination of the Conservator's appointment for damages allegedly caused by the appointment or operations thereunder, even though the appointment was allegedly made on grounds knowingly false and solely to injure the Association.*

The considerations of policy underlying the rule of *Adams* v. *Nagle, supra* (303 U. S. 532), which forbids an attack on the individual acts of a receiver or conservator in operation of a financial institution during the period of such receivership or conservatorship, require that no action for damages be entertained after the termination of the appointment based on such acts. No responsible person would accept the appointment and no conservatorship could be administered if every action taken in the course thereof could be thereafter called into question by reason of the alleged malicious state of mind of the administrative authorities, and no surety company would consent to furnish a fidelity bond subject to such risks. *Phelps* v. *Dawson,* 97 F. 2d 339 (8th Cir.)

A grant of immunity from such liability, indeed, is recognized as necessary for the faithful performance of official duties, not only in the field of banking supervision, but in the administration of Federal laws generally. It is now settled doctrine that no suit for damages may be maintained against administrative officers of the Federal Government

for action taken within the general scope of their authority, though the particular action challenged was clearly erroneous, and was allegedly known to be without basis in law or fact and issued with the sole purpose of injuring the plaintiff. The rule, originally applied to cabinet officers (*Spalding* v. *Vilas,* 161 U. S. 483, 498), has been extended to all Federal officers authorized to exercise any measure of discretion, including United States Attorneys and their assistants (*Cooper* v. *O'Connor,* 99 F. 2d 135); (*Gregoire* v, *Biddle,* 177 F. 2d 579, cert. den., 339 U.S. 949); members of the Securities and Exchange Commission (*Jones* v. *Kennedy,* 121 F. 2d 40 (D. C. Cir.), cert. den., 314 U. S. 665); members of the Parole Board, wardens of Federal penitentiaries, and the Director of the Bureau of Prisons (*Lang* v. *Wood,* 92 F. 2d 211, cert. den., 302 U. S. 686); subordinate bureau chiefs *De Arnaud* v. *Ainsworth,* 24 App. D. C. 167); deputy fire marshals (*Phelps* v. *Dawson,* 97 F. 2d 339); and specifically to officers of the Home Owners' Loan Corporation, the directors of which are the defendant members of the Home Loan Bank Board (*Adams* v. *Home Owners' Loan Corporation,* 107 F. 2d 139 (8th Cir.), as well as the Comptroller of the Currency and bank receivers appointed by him (*Cooper* v. *O'Connor,* 99 F. 2d 135, cert. den. 305 U. S. 643). On principle, the rule extends with equal force to the central banks created by the Board as Federal instrumentalities to exercise the powers prescribed by the Federal Home Loan Bank Act under the Board's direction (12 U.S.C. 1432). See *infra,* p. 97.

Government officers, to be sure, are not immune from suit; their acts are subject to judicial review in proceedings for injunctive or other appropriate relief, though taken on orders of a superior. (*Williams* v. *Fanning,* 332 U. S. 490, 493). Public policy requires, however, that such officials be given immunity from a claim for money damages and thus encouraged to "act freely and fearlessly in the discharge of their important functions". *Yaselli* v. *Goff,* 12 F. 2d 396, 406; *Gregoire* v. *Biddle,* 177 F. 2d 579, 580; *Spalding* v. *Vilas,* 161 U. S. 483.

In *Spalding* v. *Vilas, supra,* the Supreme Court said (*supra* at 498-499):

> "* * * In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is therefore wholly immaterial. * * *"

The justification for the rule, as extended to Federal officers generally, was clearly set forth in *Gregoire* v. *Biddle, supra* at 581, in which Judge Learned Hand observed:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their

> duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books."

The immunity is liberally enforced in conformity with the vital public policy which it serves. Erroneous orders and decisions on matters duly committed to administrative determination cannot be made the basis for money damages, even though the order in controversy was previously set aside on direct judicial review for lack of basis in fact or law,

> *Jones* v. *Kennedy,* 121 F. 2d 40 (D.C. Cir.) per Judge, now Chief Justice Vinson, cert. den., 314 U. S. 665;
> *Standard Nut Margarine Co.* v. *Mellon,* 72 F. 2d 557, cert. den., 293 U. S. 605,

or was based on grounds "knowingly false or wrong",

> *Barsky* v. *United States,* 167 F. 2d 241 (D.C. Cir.);
> *Gregoire* v. *Biddle,* 177 F. 2d 579, (2d Cir.);

or was entered because of "sympathy" with the "political welfare" of a cabinet officer in retaliation for the plaintiffs' efforts to have such officer removed.

> *Jones* v. *Kennedy, supra* at 42.

The character of the damage alleged is immaterial. The rule of immunity extends to all such damage, whether for defamation of character (*Glass* v. *Ickes,* 117 F. 2d 273); the deprivation of liberty through false arrest (*Gregoire* v. *Biddle,* 177 F. 2d 579; *Yaselli* v. *Goff,* 12 F. 2d 396) or wrongful commitment to prison or an insane asylum (*Brown*

v. *Rudolph,* 25 F. 2d 540; *Lang* v. *Wood,* 92 F. 2d 211); irreparable damage to the plaintiff's business (*Standard Nut Margarine Co.* v. *Mellon,* 72 F. 2d 557, 558); or even the destruction of property by "tortious conduct" of alleged "willfulness" or "wantonness" (*Atchley* v. *Tennessee Valley Authority,* 69 F. Supp. 952, 954, 956); see *Spalding* v. *Vilas,* 161 U. S. 483. In *Spalding* v. *Vilas, supra,* for example, recovery was denied for inducing breach of contract, and in the *Mellon* case for illegally requiring the plaintiff's dealers either to comply with inapplicable laws or to discontinue the sale of the plaintiff's product. In the *Atchley* case, the Tennessee Valley Authority, though expressly authorized to "sue or be sued", was held immune from liability for flooding private lands, notwithstanding the allegation of "willfulness" and "wantonness", on the authority of *Spalding* v. *Vilas, supra, Standard Nut Margarine Co.* v. *Mellon, supra,* and other similar decisions, 69 F. Supp. at p. 956.

Thus, no action for damages is maintainable, either against any officers of the Federal Home Loan Bank Administration or its successor, the Home Loan Bank Board, for appointing a conservator pursuant to findings committed to their determination by valid statutory authority. (*Jones* v. *Kennedy, supra; Standard Nut Margarine Co.* v. *Mellon, supra; Atchley* v. *Tennessee Valley Authority, supra*), or against a conservator thus appointed for operating an association pursuant to the "lawful" regulations "of the department under whose authority" he was "acting". *Cooper* v. *O'Connor,* 107 F. (2d) 207, 209, cert. den. 308 U. S. 615.

The rule of immunity from such damage claims applies with equal force to the Federal Home Loan Banks, which are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95, 102. The Federal Home Loan Banks are endowed with statutory powers exercised only "with the approval of the [Home Loan Bank] Board" (12 U.S.C. 1432) and in furtherance of the purpose and pol-

icies of the Federal Home Loan Bank Act (12 U.S.C. 1431) and the Home Owners' Loan Act of 1933 (12 U.S.C. 1464). Like other federal instrumentalities, they must be accorded immunity from such damage claims to insure the "fearless" discharge of their "important governmental function". *Gregoire* v. *Biddle, supra; Phelps* v. *Dawson, supra; Atchley* v. *T.V.A., supra.* Any other rule would render the power conferred on the Banks "impossible to exercise, or would prevent its exercise by the dread of an immeasurable responsibility." *Bedford* v. *United States,* 192 U. S. 217, 224.

No liability may be imposed in any event where, as here, the Bank is sought to be held accountable in damages merely for respecting the apparent authority of a conservator appointed, not by the Bank, but by the supervisory authority, the Home Loan Bank Board or its predecessor. The conservator's authority in individual transactions cannot be questioned by the Federal Home Loan Banks on any ground, including fraud, prior to the outcome of litigation contesting the validity of the conservator's appointment. *Adams* v. *Nagel, supra.* Certainly, the Bank cannot be mulcted in damages for honoring an administrative order, the issuance of which does not render the appointing authority itself pecuniarily liable. *Yearsley* v. *Ross Construction Co.,* 309 U. S. 18, 23.

The Mallonee action is thus not maintainable against any of the appellants for damages allegedly caused by the order appointing the Conservator or the Conservator's operations thereunder. Contrary to appellee's contentions, this conclusion is in nowise affected by the Board Order No. 388 of January, 1948, providing for the termination of the Conservator's appointment. That order contained no finding that the original appointment was erroneous, but even if it had, it would provide no basis for subjecting the appellants to liability in damages. The rule of immunity would apply even though the appointment were subsequently held erroneous on judicial review. *Standard Nut Margarine Co.* v. *Mellon, supra; Jones* v. *Kennedy, supra.* There is no possible basis for a different rule as-

suming, contrary to fact, that the appointment was terminated because of a subsequent administrative determination that the appointment was initially erroneous.

Nor is there anything in the Board's regulations or orders evidencing any intention to modify or abrogate the judicially-created rule of immunity from such damage claims. The Board Regulations have long required the filing of a "detailed report" and administrative review of the Conservator's "accounts", on the termination of his appointment (Section 207.9, App. B, *infra,* p. 161). No suggestion is or could be made that these Regulations purport to render the Conservator financially liable for any alleged invalidity in the Board order appointing him.

The Board Order No. 388 of January 17, 1948, on which the Association relies, directed the Conservator to furnish an "accounting" in his official, not his individual capacity, and thus required no more than the performance of official duties under existing regulations. The Board's direction to furnish the accounting to the Association's shareholders added nothing to the provisions for full disclosure under the then existing Board regulations.[7] At all events the order does not even purport to set forth any rule, much less a new one, to measure the Conservator's liability on any transaction disclosed in his accounting. Certainly, no liability could be lawfully imposed for acts done in conformity with the agency's "prior decision" appointing the Conservator (*United States* v. *Morgan,* 307 U. S. 183, 192) either by a retroactive Board order (*Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.,* 284 U. S. 370; *United States* v. *Morgan, supra*), or by departure in a "single instance" from the Board's duly prescribed regulations (*United States* v. *McGrath,* 181 F. 2d 839, 841). Accordingly, no such retroactive construction could be given Order No. 388 in the absence of the "clearest mandate". *Claridge Apts. Co.* v. *Commissioner of Int. Rev.,* 323 U. S. 141, 164; *Fullerton-Krueger Lumber Co.* v. *Northern P. R. Co.,* 266 U. S. 435; *United States* v. *St. Louis, S. F. & T. R. Co.,* 270 U. S. 1;

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[7] All inventories, statements, and reports of a Conservator are available for inspection as the Board may direct. (Reg. Sec. 207.10, App. B, *infra* p. 162).

Hassett v. *Welch,* 303 U. S. 303; *Transcontinental & West. Air* v. *Civil Aeronautics Bd.,* 169 F. 2d 893 (D.C. Cir.).[8]

The rule of official immunity from damage actions thus precludes surcharging the Conservator's accounts for any liability based either on the alleged invalidity of the order of appointment or neglect in the performance of his duties (*Lucking* v. *Delano,* 122 F. 2d 21 (D.C. Cir.)), or for any act other than the use of his official position to make a secret personal monetary gain (*Baker* v. *Schofield,* 243 U. S. 114), which, of course, is not here alleged.[9]

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[8] The use of the term "rescind" in Board Order No. 388 is of no significance. Even as used with respect to contracts, the term "rescind" may mean merely a termination for the future. *Illges* v. *Congdon,* 248 Wis. 85, 21 N.W. 2d 647; *Haaser* v. *A. C. Lehmann Co.,* 130 Conn. 219, 33 A. 2d 135; *George H. Finlay & Co.* v. *Swirsky,* 98 Conn. 666, 120 Atl. 561, 562-563; *Hurst* v. *Trow's Printing & Bookbinding Co.,* 2 Misc. Rep. 361, 22 N.Y. Supp. 371. The Board's contemporaneous instruction to defer the termination of the conservatorship until after a new election of directors (R. 10312), while it cannot now be invoked to question the final Court order removing the Conservator, plainly shows that, on the undecided question of the validity of the original order of appointment for alleged misconduct of the Association's management, Order No. 388 was not intended as a vote of confidence in that management.

[9] As an "officer of the United States," an administrative receiver or conservator is, of course, liable to criminal prosecution for embezzlement or false reports. *Weitzel* v. *United States,* 274 Fed. 101, cert. den., 257 U.S. 644. See also 18 U.S.C. 657.

Whether, on the basis of the Board's Regulation and Order No. 388, or apart therefrom, an independent judicial proceeding could be brought to compel the Conservator to render a "detailed" report of the Association's operations under his management presents a separate question. (See *Lucking* v. *Delano, supra* at 29). Any issues which might arise in such proceedings as to the completeness of the Conservator's disclosure, it should be noted, would in no event touch the matters set for hearing in the Board order of September 9, 1949, in controversy, or the charges of fraud in the Mallonee action, and would, therefore, provide not the slightest basis either for the maintenance of the Mallonee action or for enjoining the Board hearing.

The conclusive answer to the claim of jurisdiction in such proceedings, however, is that the accounting required by the Board's general regulations contemplates administrative review (Sec. 207.9, App. B, *infra,* p. 161), and not judicial review, which accords with the familiar practice in the case of accounts of receivers of national banks. The Board could not lawfully, and presumably did not intend to make an exception in the "single instance" of the defendant Ammann. See *United States* v. *McGrath,* 181 F. 2d 839, 841.

3. *No action is maintainable to declare invalid the loan from the San Francisco Bank or any other transaction of the Association during the period of the conservatorship.*

In addition to damages, the Association seeks a judgment declaring that the loan from the San Francisco Bank, in the remaining principal amount of $6,300,000, is not a binding obligation of the Association, and in general that all commitments and transfers made during the period of the conservatorship were without authority and of no legal force and effect. (R. 4172)

An action for such relief is plainly not maintainable. The validity of the statute and regulations under which the Conservator was appointed is settled (*Fahey* v. *Mallonee, supra*) and the status of the Conservator fixed accordingly. *Ex parte Fahey* 332 U. S. 258. The plaintiffs and the Association themselves allege that the appointment and operations thereunder were done with "color of authority" (R. 2974), and that the alleged illegality appears, not from anything on the face of the order of appointment, but the alleged "fraudulent" motives nowhere recited in the order itself (R-2986). All contracts and other business dealings of private persons with the Association during the conservatorship are therefore protected by the familiar principle regularizing transactions with *de facto* officers. *Cocke* v. *Halsey,* 16 Pet. 71, 87; *Waite* v. *Santa Cruz,* 184 U.S. 302; *Norton* v. *Shelby County,* 118 U. S. 425, 441; *County Court of Ralls County* v. *United States,* 105 U. S. 733; *Rockingham County* v. *Luten Bridge Co.,* 35 F. (2d) 301; *United States* v. *Lindsley,* 148 F. (2d) 22, cert. den., 325 U. S. 835, 66 ALR 735, 742. Indeed, the Association, while it asserts generally that all of the Conservator's transactions were without authority and void (R. 4172), does not make bold to challenge the validity or binding effect of any of the loans made during the conservatorship to individuals borrowing money from the Association to construct or purchase homes. By

implication, the Association recognizes the binding force of these commitments, in tenderin g certain allegedly "improvident" loans in payment of the loan from the San Francisco Bank to the Association (R. 4175). And, while it is alleged that the Conservator failed to make appropriate endorsements (R. 2993), it is nowhere suggested that borrowers should not be credited for any payments of principal or interest made during the conservatorship on loans from the Association. Nor is there any specific contention that the private banks, in which the Association kept its accounts, may be charged for the moneys checked out of such accounts during the period of the conservatorship.

Such transactions may, of course, have been entered into by private persons with due regard to their own economic advantage; the Association alleges that the (G.I.) 4% loans were not profitable to the Association, and that reduction in interest rate of loans made prior to the conservatorship was an unwarranted concession to the borrowers (R. 4177). The contracts complained of cannot now be set aside, however, any more than contracts or other transactions between private parties generally, under the rule regarding dealings with *de facto* officers.

The simple fact is that the complaint and the Association cross-claim, in this aspect, are directed solely at the subsidized 2% loan from the Association's reserve Bank, the Federal Home Loan Bank of San Francisco. The policy of the Home Owners' Loan Act, however, as well as the rule governing transactions with *de facto* officers, plainly forbids any attack on the transactions between an association during a conservatorship and its reserve Bank, even though it be alleged that the Bank "knew" that the order appointing the conservator was prompted by unlawful motives not apparent on the face of the order. The Banks established under the Federal Home Loan Bank Act, were created for the very purpose of freely extending to associations, in times of financial crisis in their affairs, credit which could

not be obtained from any private source, and at low interest rates made possible only by the Government's contribution of capital to the banks (75 Cong. Rec. 14453). Such credit obviously could not and would not be made available when most needed if the undertaking of the association to repay the loan and the pledge of collateral to secure the same, could be thereafter denied validity because of a claimed defect in the conservator's authority for reasons nowhere appearing on the face of the order of appointment. The Banks, though they cannot act without the Bank Board's approval in any case (12 U.S.C. 1432), may decline to make a loan to an association in their discretion (12 USC 1430). Indeed, the Association frankly admits that its very object was to prevent the San Francisco Bank from making the loan, and expressly alleges "that the said Long Beach Association and plaintiffs, the Shareholders Protective Committee, have done everything within their power to warn said cross-defendants *and to prevent said cross-defendants from advancing said money to the said A. V. Ammann.*" (R. 4178) (Italics supplied)

The consequences of calling into question the loans made by a reserve Bank to an association pending litigation as to the validity of the conservator's appointment, confirms the conclusion that the maintenance of an action for such purpose may not be permitted. For if the credit of the reserve Bank were thus denied an association, it would be compelled to undertake a forced liquidation to meet its money requirements to pay withdrawals or other demands, with disastrous results to the shareholders, and without, as shown above, any recourse by way of an action for damages against the conservator (see *supra* p. 42). The only alternatives would be to close the association or to make a forced sale of its notes and other assets at distressed prices. It was just such financial disasters which the reserve Banks were created to avoid (75 Cong. Rec. 14458).

The principles confirmed in *Adams* v. *Nagle, supra,* therefore require that the Banks be permitted to serve their intended function by making advances to associations during a conservatorship, even where it is alleged that the

conservator lacked authority because his appointment was prompted by "malice" or "fraudulent" motives nowhere disclosed on the face of the order. The Banks are bound to acknowledge the conservator's authority in all individual business transactions connected with the operation of the association, and cannot question his authority in such collateral proceedings on any ground, including "fraud" *Adams* v. *Nagle, supra;* see *supra* p. 36. Prior to the termination of the Conservator's appointment, therefore, the San Francisco Bank loan and the pledge of collateral to secure the same were plainly impervious to attack. The same must be true after the termination of the appointment. For if such actions were maintainable, no regional Bank would make a loan pending adjudication of the validity of the conservator's appointment, with the result that the conservatorship would either have to be terminated and the former management restored in order to permit normal operations, or the conservator would be required to close the association or place it in receivership for liquidation.

What has been said assumes that the complaint and Association cross-claim sufficiently allege that the San Francisco Bank "knew" that the defendant Fahey was prompted by improper motives in appointing the Conservator. The contrary, however, is true. The acts deemed to constitute "fraud" must be alleged with particularity. *Meeker* v. *Baxter,* 83 F. (2d) 183, 186; see *Chamberlain Machine Works* v. *United States,* 270 US 347. The acts of the San Francisco Bank in making loans to the Association are, of course, not themselves fraudulent. Nor is there any motive alleged which tainted such acts, otherwise innocent, with fraud of any kind. At most, it is alleged that the Bank acted with "knowledge" (R. 4179) or with "knowledge of the pendency of the present action" (R. 3044) or with "knowledge" of the plaintiffs' and the Association's "rights, titles, interest and ownership," and the "terms and conditions" of the Conservator's appointment (R. 3086) and of the Conservator's "lack of authority" (R. 4173).

In fact, the gravamen of the claim against the San Francisco Bank is that it was "entirely and completely dominated" by the defendants Fahey and Ammann (R. 3028) and is liable therefore as the "alter ego" of the latter in disregard of the Bank's separate corporate entity. A sufficient answer is that, if the Bank were dominated by the appointing authorities, it certainly cannot be held liable in honoring orders for which the appointing agency is not itself pecuniarily liable. *Yearsley* v. *Ross Construction Co.*, 309 US 18, 23. Moreover, the Federal Home Loan Banks, while they exist only at the will of the Board and may act only with the Board's approval, are managed during their corporate existence by their own 12 directors, 8 of whom are elected by the member associations of the respective Banks. In these circumstances, the Banks must be treated as legal entities separate from the Home Loan Bank Board and its officers, just as wholly owned government corporations are generally treated as legal entities separate and distinct from the United States itself. *Lynn* v. *United States*, 110 F. (2d) 586.

B

ALL CLAIMS FOR RELIEF BASED ON THE ALLEGED INVALIDITY OF THE CONSERVATOR'S APPOINTMENT ARE BARRED FOR THE FURTHER REASON THAT THE PLAINTIFF SHAREHOLDERS AND THE ASSOCIATION FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDY

The applicable regulations effective in 1946 then provided, as they now provide, for an administrative hearing on the appointment of a Conservator, at the request of an association, at which the association "may appear and show cause why the Conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the Conservator or receiver." (Reg. Sec. 206.2, App. B, *infra*, p. 150) The Association, acting through its board of directors, actually proceeded under this provision and, in May 1946, requested such an administrative hearing (R. 140). But on July 1, 1946, the plaintiffs "nevertheless demanded and obtained an injunction to prevent the administrative hearing" and thus prevented the Home Loan Bank Admin-

istration from the "making of a record" as to whether the charges were "well-founded". *Fahey* v. *Mallonee,* 332 U.S. at 219 (R. 157, 222, 372). Not only have they refused to exhaust the administrative remedy specifically provided for these cases, but they have fought to prevent the Board from making that remedy available to them.[10]

Appellees' complaint should, therefore, have been dismissed under the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50-51; *Macauley* v. *Waterman Steamship Corp.,* 327 U.S. 540; *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117, 123; *Federal Power Comm.* v. *Arkansas Power & Light Co.,* 330 U. S. 802; 51 Har. L. Rev. 1251, *et seq.*

That the same rule is applicable here requires no extended argument, in view of the decision in *Fahey* v. *Mallonee,* supra, at p. 250. An administrative decision, after hearing, if favorable to the Association, would have obviated any necessity for recourse to the Courts to remove the Conservator. *United States* v. *Ill. Central R. R. Co.,* 291 U.S. 457, 463; *Myers* v. *Bethlehem Shipbuilding Corp., supra; Macauley* v. *Waterman Steamship Corp., supra; Goldsmith* v. *United States Board of Tax Appeals, supra; Federal Power Commission* v. *Arkansas Power & Light Co., supra.* Even if unfavorable, the hearing would have permitted a preliminary determination by an expert administrative tribunal (*Ill. C. R. Co.* v. *Interstate Commerce Comm.,* 206 U.S. 441, 454); (*Gt. No. R. Co.* v. *Merchants Elev. Co.,* 259 U.S. 285, 291), and thus "make a record" on which judicial review, if necessary or appropriate, could properly be based.

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[10] Under the terms of Order No. 5309, dated June 5, 1946, which set the administrative hearing, shareholders and other interested parties could intervene in and appear at the hearing (R. 145):

"And it is further ordered that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file a petition for leave to intervene at said hearing."

Fahey v. *Mallonee, supra* at 256; *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 227; *Red River Broadcasting Co.* v. *FCC,* 98 F. 2d, 282, 285, 286 (D.C. Cir.).

That the administrative hearing in this case was provided by lawful regulation rather than by statute is plainly immaterial. *Goldsmith* v. *United States Board of Tax Appeals, supra; Red River Broadcasting Co.* v. *F C C, supra;* see *National Broadcasting Co.* v. *United States, loc. cit. supra.* The further objection that a hearing would be futile because of alleged bias and prejudice of the Board was expressly rejected by the Supreme Court in *Fahey* v. *Mallonee, supra,* in which the Court observed, "We cannot agree that a court should assume in advance that an administrative hearing may not be fairly conducted" (332 U. S. at 256).

The fact that the order of appointment was put into effect in advance of hearing affords no basis for an exception to the exhaustion rule. *Fahey* v. *Mallonee, supra; Yakus* v. *United States, supra.* The remedy, if any, is to stay enforcement of the order pending administrative hearing, not to secure an independent judicial determination. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 444-445. To hold otherwise would "substitute the court for the administrative tribunal." *Tagg Bros. & Moorhead* v. *United States, loc. cit. supra. Red River Broadcasting Co.* v. *Federal C. Commission,* 98 F. 2d 282, 287. Even such stay should be denied, however, where the public interest requires, notwithstanding allegations of irreparable injury. *Yakus* v. *United States,* 321 U. S. at 440-442. And it is now settled that the temporary appointment of a Conservator in advance of hearing is required to protect the Association "in view of the delicate nature of the institution and the impossibility of preserving credit during an investigation" *Fahey* v. *Mallonee, supra* at 253.

Any damages complained of, moreover, were susceptible of administrative correction by "administrative remedy * * * ignored by the objector", *Utley* v. *St. Petersburg,* 292 U. S. 106, 109-110; *Lichter* v. *United States,* 334 U. S.

742, 793-794. Such damage allegedly resulted from withdrawals of $6,000,000 of savings (share capital) shortly after the Conservator's appointment (R. 311, 3220, 3246); a contemporaneous loan of $7,300,000 from San Francisco Bank (R. 668) secured by a pledge of $12,000,000 of notes and trust deeds owned by the Association (R. 3224, 3584-6) and some $8,300,000 of Government bonds previously deposited with the former Los Angeles Bank for "safe keeping" (R. 3751-2, 3582); the payment to the San Francisco Bank of $1,000,000 of principal in October 1946 (R. 4226-7), and $201,518.18 of interest (R. 4229), leaving an unpaid balance of $6,300,000 at 2% interest (R. 4172); and the purchase of shares of stock of the San Francisco Bank in amounts (R. 4219, 4222) which, when coupled with that previously owned by the Association (R. 4224) satisfied the requirements of Section 10(c) of the Federal Home Loan Bank Act for a Bank loan to the Associaton of $7,300,000.[11]

On their face, the Bank loan and pledge of collateral to secure the same resulted in no economic loss to the Association. For the Conservator was thus enabled to pay off the withdrawing savers (shareholders) with the proceeds of a

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[11] Under Section 10(c) the borrower must purchase stock equal to one-twelfth of the loan.

The Bank loan notes bear dates of June 28, November 20, 22. 24, 1947 (R. 4172); in fact these notes were renewal notes of loans made in 1946 (R. 10445).

It is also alleged that the Association under the Conservator made $4,000,000 of "improvident" 4% (G.I.) loans (R. 4174), but the Association (which at the time the allegation was made had been restored to its private management for a period of four months) nowhere alleges that any of these loans occurred prior to opportunity for administrative hearing. As appears from the face of the pleadings all transfers of bonds, other than the pledge of the $8,300,000 of securities, occurred long after opportunity for administrative hearing was afforded (R. 4196, 4199, 4201, 4203).

loan from the San Francisco Bank at an interest rate of 2%, substantially less than the prior dividend rate on the share capital of 2½% to 4% (R. 334), and at the same time, preserve to the Association the full return of principal and interest payments on the mortgage notes. Indeed, the resulting "torts" alleged are purely technical "conversions" (R. 4193 et seq.), based on the fallacious theory that all acts of the Conservator were "void ab initio," (R. 3079), not accompanied by any actual monetary loss.

If, for any reason, however, the Association preferred to liquidate the loans and release its assets from pledge, the Board, after administrative hearing, and as part of any relief granted, could have directed the investment of public funds as share capital to replace the savings previously withdrawn during the conservatorship, and thus enabled the Association to repay the San Francisco Bank loan and procure the return of all the collateral pledged, without Court order. The Board has possessed such power ever since the establishment of the Federal Savings and Loan System in 1933. Home Owners' Loan Act of 1933, as amended, Sec. 2(a), 4(a), 4(n), and 5(j), App. A *infra*, p. 129; 12 U. S. C. 1461(a), 1463(a), (n), and 1464(j).

Assuming, however, that there were any occasion to seek judicial relief, exhaustion of the administrative remedy was a necessary prerequisite. Since a full hearing must necessarily precede the removal of the conservator in any event, the hearing should initially be held before the administrative agency, so that subsequent judicial review, if any, may be had on the administrative record, with due regard to the determination of an agency "informed by experience" (*Ill. C. R. Co.* v. *Interstate Commerce Comm.*, 206 U. S. 441, 445) and acquainted "with the many intricate facts * * * commonly to be found in a body of experts." *Gt. No. R. Co.* v. *Merchants Elev. Co.*, 259 U. S. 285, 291. To "hold otherwise would be in effect to substitute the determination of the court for the determination which * * * should be made by" the administrative agency. *Red River Broadcasting*

Co. v. *F. C. C.,* 98 F. 2d, 282, 287; see *Marshall* v. *Pletz,* 317 U. S. 383, 388; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 444.

An administrative determination, had it been requested and obtained, would have furnished such expert administrative judgment on the propriety of the initial appointment as well as the need, if any, for continuing the conservatorship thereafter. The Board regulations expressly provide that the hearing extend to the question whether "the Conservator * * * should not have been appointed." (Reg. 206.2 App. (B), *infra* p. 151).

C

THE CLAIMS BASED ON THE ALLEGED INVALIDITY OF THE ORDER APPOINTING THE CONSERVATOR ARE NOT MAINTAINABLE FOR THE FURTHER REASON THAT THE ORDER, IF SUBJECT TO JUDICIAL REVIEW, IS VALID AS A MATTER OF LAW ON THE ADMITTED FACTS, AND BECAUSE SUCH ORDER, MOREOVER, IS NOT OPEN TO REVIEW ON THE GROUNDS ALLEGED IN THE COMPLAINT AND CROSS-CLAIMS.

1. *The order of May 20, 1946, appointing the Conservator, is valid as a matter of law on the admitted facts*

The admitted facts of this case show that prior to the appointment of the Conservator, the management of the Association had been engaged in unlawful acts designed to perpetuate their control of the Association and to remove themselves beyond power of recall by either the shareholders or supervisory authorities. These acts were specifically assigned as grounds for the appointment of the Conservator, and are sufficient as a matter of law to justify the appointment without regard to the sufficiency of other charges set forth in the order of appointment.

The "More Definite Statement" of the grounds for appointing the Conservator, furnished by the Administration at the Association's request, recites that certain directors of the Association, namely, T. A. Gregory, J. E. Gregory, M. T. Killingsworth and S. I. Bacon, undertook or attempted to convert their shareholdings and other funds, totaling approximately $21,000, into approximately 21,000 separate

purported share accounts of $1 each, in violation of the rights of over 16,000 share account holders of said Association, and in violation or attempted violation of their duties as directors. (App. C, *infra,* p. 173) The establishment of such share accounts is expressly admitted in the Association's pleadings (R. 3242).

The "More Definite Statement" also alleges that on May 8, 1946, the Association authorized expenditure of $100,000 for legal expenses in connection with anticipated litigation with the supervisory authorities, and that a check of $50,000 was actually disbursed; the Association admits and indeed asserts that such authorization was adopted and that such check was disbursed pursuant thereto to resist the appointment of a Conservator under the very circumstances of this case (R. 3239).

The actions thus admittedly taken by the directors were both in plain violation of their fiduciary obligations as directors and intended to nullify the express charter provisions of the Association. They are themselves sufficient bases for the order appointing the Conservator.

The officers and directors of an Association, even more than those of an ordinary corporation, are trustees, owing a fiduciary duty to the shareholders of the corporation. Federal savings and loan associations are required to be modeled after local mutual thrift institutions in the United States, i.e., building and loan associations and mutual savings banks. Sec. 5(a), Home Owners' Loan Act of 1933, (12 U.S.C. 1464(a)). Such institutions are "quasi-public corporations, chartered to encourage thrift and prompt ownership of homes, with powers and immunities peculiarly their own" (*Hopkins Fed. S. & L. Asso.* v. *Cleary,* 296 U.S. 315, 328) "and so organized as to attract the savings of persons of modest means." (*People ex rel. Barrett* v. *Logan County Building &Loan Association,* 369 Ill. 518, 525, 17 N.E. 2d 4). The nature of the operations and the modest financial means of those investing in such organizations has indeed prompted the Courts to characterize them as "savings institutions * * * established solely for charitable purposes," (*Oulton* v. *German Savings Society,*

17 Wall. 109) or "nonprofit making." See *Davenport National Bank* v. *Board of Equalization,* 123 U.S. 83. As the Supreme Judicial Court of Massachusetts observed in *Lowell Co-Operative Bk.* v. *Co-Operative Central Bk.,* 287 Mass. 338, 191 N. E. 921, 925:

> "'* * * These institutions are established wholly for public purposes, are intrusted with large amounts of money belonging to persons who can ill afford to lose it, and who are in no condition to be able to judge of, or provide for, its security. * * *' It is a matter of common knowledge that co-operative banks are largely dealt with by persons of small or moderate means as a method of accumulating savings. * * *"

It is for these reasons that both the Federal Government and the States have commonly provided for close supervision and regulation of the activities of such associations.[12] *Treigle* v. *Acme Homestead Association,* 297 U.S. 189, 197, 198.

The directors of mutual savings institutions are accordingly held to the strictest standards of accountability. Directors of ordinary corporations are indeed fiduciaries and therefore forbidden to use their office for their private advantage. *Pepper* v. *Litton,* 308 U. S. 295. The directors of mutual savings institutions, however, unlike those of other corporations, are trustees in the strictest sense. As the Court observed in *Greenfield Savings Bank* v. *Abercrombie,* 211 Mass. 252, 97 N. E. 897:

> "The savings bank and its managing officers or trustees are held to the same duty as ordinary trustees of a direct trust."

See also *French* v. *Armstrong,* 79 N.J.E. 289, 82 Atl. 331 (building and loan association) and *Huntington* v. *Nat. Savings Bank,* 96 U. S. 388, (self-perpetuating directors as "trustees" of mutual savings banks).

The enforcement of the trustees' obligations of the direc-

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[12] Correspondingly, special benefits are conferred by the Government. See Sec. 4(n), 5(g), 5(h), 5(j) and 6, Home Owners' Loan Act of 1933, as amended, App. A, *infra,* pp. 129 to 133.

tors of an association is a primary responsibility of the supervisory authorities. The Supreme Court in *Treigle* v. *Acme Homestead,* 297 U. S. 189, 197, stated:

> "The state has a peculiar interest and a concomitant power of supervision and regulation to prevent injury and loss to their members."

The creation of the 21,000 one dollar share accounts was a plain breach of the fiduciary obligations of the directors of the Long Beach Federal Savings & Loan Association, as well as of the Association's charter provisions, and it was the right and duty of the Federal Home Loan Bank's administration to take corrective action. It is settled doctrine that the officers and directors of even an ordinary corporation may not use their positions, either to assist other persons to secure control of the corporation (*Carlisle* v. *Smith,* 234 Fed. 759; *Gerdes* v. *Reynolds,* 28 N.Y.S. 2d 622; 3 *Fletcher, Cyclopedia Corporations,* Sec. 1000 (perm. ed.) or to transfer voting control to themselves. As the Court observed in *Andersen* v. *Albert & J. M. Anderson Mfg. Co.,* 325 Mass. 343; 90 N.E. 2d 541-544:

> "Directors cannot take advantage of their official position to manipulate the issue and purchase of shares of the stock of the corporation in order to secure for themselves the control of the corporation and then to place the ownership of the stock in such a position as will perpetuate that control. Such action constitutes a breach of their fiduciary obligations to the corporation and a wilful disregard of the rights of the other stockholders." (citations p. 544)

This is true even though no specific charter provisions are violated. *Andersen* v. *Albert & J. M. Anderson Mfg. Co., supra; Carlisle* v. *Smith, supra.* Such transactions are peculiarly vulnerable where, as here, they serve to frustrate the express provisions of the corporate charter. An "issue of stock entirely for the separate benefit of the directors" is in "violation of the trust confided in the directors". *First Mortgage Bond Homestead Ass'n.* v. *Baker,* 157 Md. 309, 145 Atl. 876.

Section 4 of the Association's charter provides in part:

> "In the consideration of all questions requiring action by the members, each holder of a share account shall be permitted to cast one vote for each $100, or fraction thereof, of the participation value of his share account. * * * No member however shall cast more than 50 votes. * * * "

By the device admittedly employed in this case, 21,000 one dollar share accounts were created in such manner as to vest in the hands of four directors, not four votes or a maximum of 200, but actually 21,000 votes, constituting 10% of the maximum potential total voting power of all shareholders of the Association.[13]

It is no answer, of course, that the votes which the directors thus garnered to themselves, apart from whatever other votes they held, did not constitute an actual majority of the total theoretical potential votes of all of the Association's shareholders. In modern practice, as this Court may take judicial notice, control of 10% of the total theoretical maximum may be sufficient for practical purposes to exercise control of a corporation, such as the Association, whose shares are held by as many as 16,000 individuals.[13a] In the Public Utilities Holding Company Act of 1935, for example, while 5% of the outstanding voting securities was one test of affiliation (15 U.S.C. 79b(a)(11)) and 10% in the case of holding companies and subsidiaries (15 U.S.C. 79b(a)(7), (8), the same paragraphs recognize that equal influence and control can

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[13] The Association admits the creation of these accounts for voting purposes out of both existing share accounts and other funds. (R. 3241-3) Of course, only persons in control of the Association could set up such "memberships."

[13a] In view of the $5,000 limit on insurance of each member's shareholdings, only recently raised to $10,000, there was a natural tendency on the part of most savers to limit their investments in any single Association to $5,000, with the result that these Associations are extremely widely held. See Third Annual Report to Congress of the Housing and Home Finance Agency, p. 131, and S. Rept. No. 1536, 81st Cong., 2d Sess. (1950), p. 10, to accompany H.R. 6743, Federal Home Loan Bank System and the Federal Savings and Loan Insurance Corporation, by the Committee on Banking and Currency.

be exerted with an even lesser percentage of voting stock. The Home Loan Bank Administration could certainly reach the same conclusion with respect to the mutual financial institutions under its supervision. Sec. 5(a) Home Owners' Loan Act of 1933, 12 U.S.C. 1464(a). Were the share accounts thus created actually insufficient, however, to achieve the desired result, the attempt, coupled with the intent to achieve an unlawful purpose, would justify the Administration's action.

As set forth in the "More Definite Statement", the creation of 21,000 share accounts was coupled with other transactions designed to remove the Association's management from the control, not only of its shareholders but of the supervisory authorities as well. On May 8, 1946, as the Association admits, the Association adopted the following resolution

> "Whereas, there have been indications that retaliation against the association by those purporting to be representing the federal supervisory authorities is planned because the representative of this association duly elected as a director of the Federal Home Loan Bank of Los Angeles did not disregard the legal rights and best interest of said Bank and submit to the dictation of the Federal Home Loan Bank Commissioner, and
> "Whereas, such retaliations are unwaranted and violate the principles of our democratic government and are to the detriment of the best interests of this association.
> "Now Therefore Be It Hereby Resolved That the officers of the association be and they are hereby authorized to employ legal counsel to conduct appropriate legal proceedings to restrain said Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of this association's affairs and the sum of $100,000 is hereby appropriated and authorized to be expended for that purpose."

On May 18, 1946, the Association, acting pursuant to the above resolution, caused a check for $50,000 to be delivered to Robert H. Wallace, an attorney for the Association, as compensation both for services rendered and "to be rendered" (R. 92).

As the appointment of a Conservator would in all cases interrupt the "normal" operation of the Association, the resolution of May 8, 1946, was broad enough to authorize the use of corporate funds to defend against such appointment, even though the appointment were based principally or solely on charges of mismanagement and breach of trust by the officers and directors of the Association. Such, in fact, was the resolution's intended purpose. Admittedly, it was adopted in anticipation of the very appointment which ensued and which was based on charges of personal mismanagement and breach of trust by the officers and directors of the Association. (R. 8229; 91-93, 3227, 3232, 3237-3239.)

The appropriation or expenditure of corporate funds to defend against such charges was plainly illegal, and the Home Loan Bank Administration was authorized and indeed charged with the duty to prevent such disbursement. It is elementary doctrine that corporate funds may not be used to defend the officers and directors of the corporation against charges of personal mismanagement or misconduct in the exercise of their official duties. *Bailey* v. *McLellan,* 159 F. 2d 1014; *Rogers* v. *Hill,* 34 F. Supp. 358, 370 note (D. C. S. D. N. Y.) 152 A.L.R. 924. It is equally well settled that where such charges of misconduct are coupled with an appointment or petition for appointment of a receiver or conservator, corporate funds may not be used for defense of the management against such charges, unless it appears that the purpose is to defend the interests of the corporation "in good faith", and in no event where, as here, the facts establish a clear breach of trust, warranting removal of the management. *Bailey* v. *McLellan,*

supra; Art Print Shop v. *Friedberger-Aron Mfg. Co.,* 14 F. Supp. 120, affirmed, 82 F. 2d 1010 (3d Cir.).

On the facts admitted by the plaintiffs themselves, the Association's management was guilty of a course of breach of trust in creating the 21,000 one-dollar share accounts. The use of corporate funds to defend against the appointment of a Conservator to effect the removal of the management on any such grounds is illegal. *Bailey* v. *McLellan, supra; Art Print Shop* v. *Friedberger-Aron Mfg. Co., supra.*

Moreover, the Home Loan Bank Administration, in issuing the order of appointment, duly determined, subject to any administrative hearing, that the officers and directors of the Association had been guilty of other acts of personal misconduct and breach of trust, which findings were binding until duly set aside. *Supra,* pp. 36-38. In the view most favorable to the Association, no attorney's fees could be disbursed to defend the management against such charges save pursuant to a finding by an appropriate tribunal that such defense was in "good faith" intended to protect the interests of the Association itself. See Note, 89 A. L. R. 15.31. The Home Loan Bank Board, which may enforce even more exacting fiduciary standards than those prescribed by the common law (*SEC* v. *Cherry Corp.,* 332 U.S. 194) surely may take action to prohibit a disbursement beyond recall in advance of such finding. The argument that the funds had to be disbursed in advance of the Conservator's appointment is plainly specious. Court allowances on a showing of good faith may be made under appropriate circumstances, even after a receiver is appointed and liquidation of the corporation is ordered. Note 89 A. L. R. 153.

In these circumstances, the order appointing the Conservator was valid without regard to the sufficiency of the other charges made by the Administration, or the motives which animated them. "If the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it * * *". *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 145;

United States v. *Rock Royal Co-operative,* 307 U. S. 533, 559-
United States v. *Rock Royal Co-operative,* 307 U. S. 533, 599-560.

Accordingly, the Court need not consider whether, as alleged by the Association, the $100,000 expenditure authorized by the Association resolution of May 8, 1946, was intended to finance, not only future resistance to the possible appointment of a Conservator, but litigation covering the prior orders dissolving the Los Angeles Bank (R. 91). Such latter purpose was nowhere revealed on the face of the Association's resolution of May 8, 1946, but if, as alleged, such was the intention, and the defendant Fahey somehow divined the secret purpose of the Association's directors and sought to thwart it, such "ulterior" motive on the part of the defendant Fahey would in no wise invalidate the order appointing the Conservator when other valid purposes were also served by the appointment. *Isbrandtsen-Moller Co.* v. *United States, supra* (300 U. S. 139); *United States* v. *Rock Royal Co-operative,* 307 U. S. 533, 559-560.

2. *The order appointing the Conservator is not open to judicial review on the grounds alleged in the complaint and cross-claims.*

The complaint and cross-claims allege in substance that the grounds assigned in the order of May 20, 1946, appointing the Conservator, as well as in the More Definite Statement, furnished by the Administration, were false in fact and were, moreover, known by the Administration, to be false. These allegations furnish no grounds for review of the Administration's order.

Under the early decisions of the Supreme Court, orders of the Comptroller of the Currency, appointing receivers, and, by analogy, orders of the Administration appointing the Conservator, are not open to judicial review. *Kennedy* v. *Gibson,* 8 Wall. 498; *Casey* v. *Galli,* 94 U. S. 673, 681; *Bushnell* v. *Leland,* 164 U. S. 684.

In *Kennedy* v. *Gibson, supra* at 504-505, the Court said:

> "The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of

appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. * * *"

In *Casey* v. *Galli,* 94 U. S. 673, 679-680, the Court said:

"The declaration avers that the Association became such, by due and regular proceedings under the act. The plea denies the regularity of the proceedings in the single particular that the owners of two-thirds of the capital stock of the Bank did not authorize the directors of said Bank to convert it into a national banking association, nor to accept an organization certificate as such Banking Association. According to the law of pleading, what is not denied is conceded. The giving of the Comptroller's certificate is covered by the averment in the declaration, is not denied by the plea, and is, therefore, to be taken as admitted. The plea proposes to go behind the certificate and contradict it. This cannot be done. The Comptroller was clothed with jurisdiction to decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all the purposes of this litigation.

"It has the same effect, and for the same reason, as his determination and order with respect to the amount to be collected from each stockholder in the event of the failure of the association.

In *Bushnell* v. *Leland*, the Court reaffirmed the doctrine of *Kennedy* v. *Gibson,* stating:

"* * * All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the lia-

bilities of the bank, and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power in violation of the Constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy* v. *Gibson,* 75 U. S. 8 Wall. 498; *Casey* v. *Galli,* 94 U. S. 674; *United States* v. *Knox,* 102 U. S. 423. When, after the adjudication in *Kennedy* v. *Gibson,* the questions were for a second time pressed in argument, the court contented itself with calling attention to the fact that they had been affirmatively adjudicated upon and were concluded. We see no reason now to reopen controversies which were then treated as concluded and have since been approved and in all respects fully affirmed. * * *''

In *United States* v. *Knox,* 102 U. S. 422, it is true, the Supreme Court intimated that the Comptroller's decision might be set aside if in conflict with some explicit statutory prohibition. The opinion, however, expressly reaffirmed the authority of *Kennedy* v. *Gibson,* 8 Wall. 498, and *Casey* ''nothing in this opinion is intended in any wise to affect the authority of*Kennedy* v. *Gibson,* 8 Wall. 498, and *Casey* v. *Galli,* 94 U. S. 673. On the contrary, we approve and re-affirm the rule laid down in those cases.''

Following *United States* v. *Knox,* however, the lower Federal Courts have suggested in dicta that judicial review might be had for ''clear error of law, fraud, or mistake'', as stated in some cases (see e. g. *Deweese* v. *Smith,* 106 Fed. 438, 445), or, as set forth in others, on the ground of ''fraud'' alone. See e. g. *O'Conner* v. *Watson,* 81 F. 2d 833, 836. The former standard of review is certainly ''too broad'' (*Adams* v. *Nagle,* 303 U. S. at 541); whether the Comptroller's order could be successfully challenged for ''fraud'' was left open in *Adams* v. *Nagle, supra,* the Court finding no ''actual fraud''. 303 U. S. at 543. In any event, it seems clear that the facts alleged in the present complaint and cross-claims, cannot be deemed to constitute ''fraud'' within the meaning of the possible exception permitting judicial review.

The term "fraud", as used in the dicta referred to, could have one of four possible meanings. Literally construed, it could mean fraud in the conventional sense of an intentional misrepresentation relied on to the plaintiff's damage, which incidentally is alleged in the Association cross-claim (R. 3206), but such meaning obviously could not have been intended by the cases referred to, since Government orders take effect, if at all, on the authority of the administrative officer, and not on the reliance or consent of the parties to whom they are directed.

The second possible construction is that the term "fraud" means such "clear" absence of evidence or basis for the order in controversy as to constitute fraud in legal effect. Cf. *Gt. No. Ry. Co.* v. *Weeks,* 297 U.S. 135. This construction must be rejected, however, for the reason that, under the guise of determining whether the order was prompted by "fraud" or "malice", the Courts would be required to determine whether there was "clear" lack of any basis for the order, a question which Congress has and constitutionally may leave to the final determination of the Comptroller and the Bank Board, *Kennedy* v. *Gibson, supra; Bushnell* v. *Leland, supra.* The opinion in *Adams* v. *Nagle* plainly indicates that such standard of judicial review is "too broad" (303 U.S. at 541).

The term "fraud" might be given a third meaning, that the findings of the appointing officer were not only unfounded in fact but were "known" to him to be false. This meaning was suggested "arguendo" in *Meeker* v. *Baxter,* 83 F. 2d 183, 186, in which case, however, the Court pointed out that the term "fraud" had been given no definite meaning for the purpose of such review, and further held that even on the "assumption" that the term meant a knowingly false finding, the allegations of the complaint were insufficient. In principle, again, this definition of the term "fraud" is inadmissible, since reliable evidence of the actual state of mind of the appointing officer could only be obtained by direct interrogation of the officer, a practice which the decisions expressly forbid. It is "not the function of the Court to probe the mental processes" of the adminis-

trative officials. *United States* v. *Morgan,* 304 U.S. 1, 18, 313 U.S. 409. The Courts thus could make a finding as to the actual state of mind of the appointing officer only by inference from what the officer did, and would thus again be required to determine whether there was cause for the appointment under the guise of reviewing the charge of "fraud". This is particularly true where, as here the charges which are alleged to be "knowingly false" include not merely matters of objective fact but others based on expert opinion or judgment.

This leaves open, of course, the right to judicial review in any case on a showing of personal corruption or other breach of trust for personal gain (*Baker* v. *Schofield,* 243 U.S. 114; *Village of Brookfield* v. *Pentis,* 101 Fed. 2d 516, 523) but nothing of the sort is here alleged.

D

THE MALLONEE ACTION IS IN NO EVENT MAINTAINABLE AGAINST THE INDIVIDUAL NONRESIDENT DEFENDANTS, FOR THE REASON THAT THE DISTRICT COURT LACKED JURISDICTION OVER THE PERSON OF SUCH DEFENDANTS.

1. *The Court lacks personal jurisdiction over the non-resident defendants in respect to the demands in the shareholders' complaint and Association's cross-claims.*

The shareholders' complaint and the Association's cross-claims were filed as *in rem* actions under former Sec. 118 (now 1655) of Title 28 U.S.C. to secure the return of property located in the State of California, and to remove a cloud on title thereto. (R. 2965, 3192). The only attempt to serve any of the non-resident defendants was made outside the State of California, see *supra,* p. 8. Such service was clearly not authorized by former Sec. 118 (now Sec. 1655) of Title 28 U.S.C.

a. *Prior to the termination of the conservatorship, the Mallonee action was not maintainable against the non resident defendants even for the limited purpose of removing the Conservator.*

It may be assumed, arguendo, that the non-resident defendants were not indispensable parties to an action to remove the Conservator who was personally served and subject to the District Court's jurisdiction, although this is far from clear since the Conservator's taking office not merely physically ousted the former management but suspended its *legal* authority to represent the Association (Reg. 207.3, App. B, p. 154), a disability which could hardly be removed by the Conservator without authority from the Board. *Daggs* v. *Klein,* 169 F. (2d) 174. The non-resident defendants, however, could not be served in such action for any purpose under Sec. 1655 (former Sec. 118) of Title 28 U.S.C.

Sec. 1655 provides:

> "In an action in a district court to endorse any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain."

The Mallonee action is not and never was one within the reach of Sec. 1655. The Board's regulations direct the *Conservator* to take "possession" of the Association's assets, and thereupon vest *in him* the powers of management previously exercised by the Association's officers and directors (Reg 207.1-3, App. B, *infra,* p. 154); the regulations purport to vest "title" in receivers (Reg. 208.3 App. B, *infra,* p. ——), but not in conservators. Even the Conservator's "possession" is plainly intended to be nothing more than that of a manager or representative of the Association. The Conservator's appointment involves, therefore, only a change in the personnel acting for the Association, which falls far short of "claims made to property in the nature of ownership or proprietary interest," (*Ladew* v. *Tennessee Copper Co.,* 179 Fed. 245, 251; *Cohen Realty Co.* v. *National Savings & Trust Co.,* 125 F. (2d) 288, 290) to which alone Sec. 1655 relates.

At all events, nothing in the statute or the Board regula-

tions purport to authorize the *non-resident Board members* to take "possession" even in such limited sense, nor is it alleged that any of the non-resident defendants ever did so. In brief, the only adverse "claim," if any, to the Association's assets was that of the Conservator, not of the non-resident defendants. And to effect service on a non-resident defendant under Sec. 1655 of Title 28 U.S.C., "The absent party must have made an express or implied assertion of adverse ownership or encumbrance," *Rainbow Rubber Co.* v. *Holtite Mfg. Co.,* 20 F. Supp. 913-916. The case of *Commonwealth Trust Co.* v. *R.F.C.,* 28 F. Supp. 586, on which appellees rely, is not in point; there the non-resident R.F.C. itself claimed an interest in the property as pledgee.

Assuming, however, that the non-resident defendants made a claim to the local property of the Association in any sense, such claim was necessarily made in their official capacities as officers of the Administration or Board. *Wood* v. *Phillips,* 50 F. (2d) 714, 717. An action to adjudicate such claims is therefore an unconsented suit against the United States. *Larson* v. *Domestic and Foreign Com. Co.,* 337 US 682; *Wood* v. *Phillips, supra.* Nothing in the Administrative Procedure Act constitutes consent to such suit. See *infra,* p. 78.

b. *The action is clearly not maintainable against the non-resident defendants for damages or other in personam relief.*

Upon the termination of the conservatorship and the return of the Association to its private management, the Mallonee action became one solely for damages, the invalidation of the San Francisco Bank loan and other purely *in personam* relief. But no such relief may be had against non-residents served only pursuant to Sec. 1655 (formerly 118) of Title 28 U.S.C.

Sec. 1655 (formerly 118) expressly provides that judgment in a proceeding "shall, as regards the absent defendant without appearance, affect *only the property which is the subject of the action*" (italics supplied.) Accordingly, it is settled that no action against non-resident defendants is maintainable in such proceedings for *in personam* relief,

whether for money damages (*Wilson* v. *Beard,* 26 F. (2d) 860; *Findlay* v. *Florida East Coast Ry. Co.,* 68 F. (2d) 540), injunction (*Ladew* v. *Tennessee Copper Co.,* 218 U.S. 357; *Clarke* v. *Boysen,* 39 F. (2d) 800, 815), or for either specific enforcement or the annulment of contracts (*Dan Cohen Realty Co.* v. *Nat'l Sav. & Trust Co.,* 125 F. (2d) 288; *Wilhelm* v. *Consolidated Oil Corp.,* 84 F. (2d) 739, 746; *Vidal* v. *So. Am. Sec. Co.,* 276 Fed. 855; *Maya Corp.* v. *Smith,* 32 F. (2d) 350.)

No argument is needed to show that the Association's claim for damages for alleged conversions or other torts is not a claim to specific property of the non-resident defendants (*Vidal* v. *So. Am. Sec. Co.,* supra), much less a claim to any property of the Association or other property locally situated in California. And the action to cancel the San Francisco Bank loan or any other "agreement" is "clearly in personam." *Wilhelm* v. *Consolidated Oil Corp., supra,* at p. 746; *Camp* v. *Bonsal,* 203 Fed. 913, 917. The demand for a detailed "accounting" is likewise admittedly "personal" (R. 11347), but as it is directed at the former Conservator alone, who was personally served in California, the question whether such relief may be had under Sec. 1655, against non-residents does not arise.

2. *The so-called cross-claims in interpleader afford no basis for service on the non-resident defendants, even in respect of such cross-claims alone.*

In connection with certain so-called "cross-claims in interpleader," an attempt was made to serve the non-resident defendants in Washington, D.C. under former Section 41 (28), now Section 1336, Title 28 USC, authorizing service on non-residents in interpleader actions based on diversity of citizenship of the adverse claimants. Such service could in no event provide a basis for maintaining the complaint and Association's cross-claim for damages and other relief against the non-resident defendants. *Stitzel-Weller Distillery, Inc.* v. *Norman,* 39 F. Supp. 182. As stated in *Hagan* v. *Central Avenue Dairy,* 180 F. (2d) 502 (9th Circuit), moreover, cross-claims for damages cannot be rested on

service outside the jurisdiction made under the interpleader statutes; the contrary view expressed in the concurring opinion of Judge Hall in the *Hagan* case found no support in the majority opinion. As this Court there observed (180 F. 2d at 503):

> "It would be a startling conclusion, we think, to give to Rule 13(g) and the Interpleader statute the effect of enlarging the jurisdiction of a court to create rights going beyond those to the fund which is the subject of the interpleader action. Such a construction would go far beyond the situation which called for the Interpleader statute in the first place. * * *"

Even as to the so-called "interpleaders" themselves, however, Section 1336 provides no basis for service on the non-resident defendants. The "interpleaders" were not maintainable for any purpose, and certainly not against the non-resident defendants.

First: Certain of the so-called interpleaders, those of the Title Service Company (R. 45), Wallis (R. 86), and Turner (R. 3461) are based on alleged conflicting demands during the period of the conservatorship arising out of the dispute between the Conservator and the then former management of the Association as to who was legally authorized to represent and act on behalf of the Association. Under the rule of *Adams* v. *Nagle,* 303 U.S. 532, however, the individual acts of the Conservator are valid and enforceable and not subject to collateral attack pending litigation as to the validity of the Conservator's appointment. The Conservator's appointment was here never set aside until January 1948, except for the one-day period between the original order of injunction of the District Court on September 30, 1946, and October 1, 1946, the effective date of the stay order staying enforcement of the injunction pending appeal to the Supreme Court. The cross-claimants in interpleader, Title Service Company and Wallis, were therefore bound to recognize the authority of the Conservator at all times during the conservatorship, and there were thus no "adverse claimants" as required by Section 1335. Interpleader was not required to test the Conservator's authority, more-

over, as the management of Title Service Company and the then former management of the Association were substantially identical (R. 11087), and the latter did not dispute Wallis' right to the $50,000 check for attorneys' fees (R. 91-2, 320). The dispute as to the duty of Title Service Company to execute reconveyances, as demanded by the Conservator, and as to the right of Wallis to retain the check for legal services, could thus have been decided in litigation with the Conservator alone, without any risk of double liability to either cross-claimant.

The "interpleader" of cross-claimant George Turner is even more specious, as it was not filed until after the termination of the Conservator's appointment (*supra,* p. 8). There were no "adverse claimants", as required by Section 1335, and the rental payments deposited in Court by Turner could safely have been paid to the Association without any possible risk of double liability, since no dispute then existed as to who was entitled to represent the Association.

Moreover, it is a rule of general application that a dispute between two parties as to which is duly authorized to represent a corporation does not present a case for interpleader. *Amstelbank N. V.* v. *Guaranty Trust Co.,* 177 Misc. Rep. 548, 31 NYS 2d 194, *Koninklijke Lederfabriek "O"* v. *Chase National Bank,* 177 Misc. Rep. 186, 30 N.Y.S. 2d 518, 524. In the latter case. the Court said:

> "* * * They show, to be sure, conflicting assertions as to what individuals are authorized to act on behalf of defendant's depositor and make demands on its behalf, but that presents no more than a question of agency such as defendant is called upon to decide every time a check of a corporate depositor is presented to it. The fact that the question of agency here may be complex rather than simple, and may involve the determination and application of foreign law, does not convert the case into one of two claimants."

Second. The impound of the San Francisco Bank loan and collateral, in turn, plainly presents no proper case for interpleader. The sole basis alleged in the moving papers of the Association is that in the event the Bank loan were declared invalid, the Association might be obligated to some reserve

Bank, either the San Francisco, or the Los Angeles, or Portland Bank, for a part of the benefits derived from the use of the proceeds of the loan and that the Court should resolve which of the banks were entitled to payment for such benefits. The only alleged adverse claimants are the Bank, not the nonresident Board members (R. 3563). Each of the reserve banks lawfully in existence, however, is a citizen of the United States and not of any "state" (Federal Home Loan Bank Act, as amended, App. A; 12 U.S.C. 1421; *et seq.*) and there is, thus, no diversity of citizenship among all of the adverse claimants. *Bankers Trust Co.* v. *Texas & P. R. Co.,* 241 U. S. 295, Anno. 88 A.L.R. 874. Diversity of citizenship as a basis of service of process on nonresident defendants was required by the applicable statutes when the impound was ordered under former Section 41 (26) of Title 28 U.S.C., and the requirement has expressly been reserved by amendment to the revised Judicial Code. 28 U.S.C. 1335, 2361. There was therefore no basis for out-of-state service on the Board members who are, as shown in II below, indispensable parties to any action to restore the Los Angeles Bank. See *infra* p. 100 This, of course, is in addition to the further and fatal defect that the question of the validity of the orders dissolving the Los Angeles Bank, on which this purported interpleader depends, is not open to judicial review in this proceeding, as we also show in Point II.

Third. The purported interpleader of insurance premiums allegedly owing to the Federal Savings and Loan Insurance Corporation obviously possesses none of the elements essential for a case of interpleader. The alleged adverse claimants are the Insurance Corporation on the one hand and the Association shareholders on the other, who, incidentally, sue in a derivative capacity. (See 332 U.S. at 247) The case is thus an ordinary dispute between one corporation and another with respect to a simple claim of debt. So far as we have been able to ascertain, never in the history of interpleader litigation has it ever been suggested, much less held, that a corporation can convert a simple dispute between itself and a second party into a case for interpleader by impleading its shareholders. Even on the un-

likely assumption that such device could ever be supported as a means for obtaining jurisdiction over nonresident defendants, certainly it may not be done where, as here, one of the supposed adverse claimants, the shareholders, sue only in a "derivative" capacity on behalf of the corporation itself.

Fourth. The nonresident Board members, past or present, have no personal interest in any of the property in controversy. The claim, if any, made by them, was and could only be made in their official capacity, and a suit against them, therefore, is an unconsented suit against the United States. *Wood* v. *Phillips,* 50 F. (2d) 714, 717; *Appalachian Electric Power Co.* v. *Smith,* 67 F. (2d) 451.

This conclusion is not affected by the Administrative Procedure Act, contrary to the conclusion of the court below. In general, the Administrative Procedure Act merely restates the existing law as to the scope of permissible judicial review. See Attorney General's Manual on the Administrative Procedure Act, pp. 107-108. Certainly there is not even a hint in the legislative history of the Act that it was intended to abrogate the historic immunity of the United States from suit, and the Supreme Court has recently, upon full consideration, reaffirmed such immunity without even a passing reference to the Administrative Procedure Act. *Larson* v. *Domestic and Foreign Commerce, Corp.,* 337 U. S. 682. Sec. 10 (e), in authorizing an order to "compel agency action unlawfully withheld or unreasonably delayed" merely confirms the pre-existing power of the courts to compel by writs in the nature of mandamus, the performance of an official's duty to perform a "ministerial or nondiscretionary act." See Attorney General's Manual on the Administrative Procedure Act (p. 108, 1947); *Willapoint Oysters* v. *Ewing,* 174 F. (2d) 676, 686, 689, n. 17, 690 n. 22, 692, n. 31; *State Airlines* v. *Civil Aeronautics Board,* 174 F. (2d) 510, 518; *Kirkland* v. *Atlantic Coast Line R. Co.,* 167 F. (2d) 529; *Olin Industries* v. *N.L.R.B.,* 72 F. Supp. 225.

The simple fact is that the so-called cross-claims in interpleader have been contrived by the plaintiffs and the

Association, with the cooperation of parties under the Association's control, for the transparent purpose of conferring some semblance of jurisdiction on the court over the nonresident defendants which would obviously otherwise not exist. The inclusion of the so-called cross-claims and interpleader in the Mallonee action, far from affording any basis for jurisdiction to maintain that action or to issue the injunction on appeal, is indeed a persuasive ground for directing the dismissal of the entire proceeding. The so-called interpleaders graphically illustrate the use of the Mallonee action and ancillary proceedings, first as a means of crippling the operations of the Association and rendering impossible its practical continuance under a conservatorship, and then as a means of coercing the nonresident Government defendants by harrassing and vexatious litigation, and thereby requiring them to abandon the Government's defense to money damage claims as a condition of restoring the normal exercise of its supervisory authority and banking facilities throughout the entire West Coast of the United States.

3. *The nonresident defendants at no time submitted themselves to the jurisdiction of the court below.*

The court below found that the nonresident defendants had made "general appearances" and subjected themselves to the personal jurisdiction of the court, both by seeking affirmative relief, and by the issuance of Order No. 388, terminating the conservatorship and directing that a "copy" of the order be furnished to the court (Fdg. 77, R. 8283-4; Concl. 16, R. 8301-2).

It is elementary, however, that objections to the jurisdiction of the court may now be coupled with a defense on the merits. Rule 12(b) of the Federal Rules of Civil Procedure, expressly so provides. *Orange Theatre Corp.* v. *Ray Herstz Amusement Corp.*, 139 F. (2d) 871; *Gerber* v. *Fruchter*, 147 F. (2d) 120; *Blank v. Bitken*, 135 F. (2d) 962; *Devine v. Griffenhagen*, 31 F. Supp. 624, *2 Moore's Federal Practice*, p. 2260, 2d Ed. The contention that, by directing that a copy of its Order No. 388 be filed with the court below, the

Board "waived" its special appearance and submitted to the jurisdiction of the court (R. 11346) requires only brief mention. Since a party may couple a defense on the merits with objection to the court's jurisdiction, the Board was at liberty to call the court's attention to any fact bearing on a proper disposition of the case. It is of interest to observe that the court below itself made no finding of submission to its jurisdiction in its opinion of November 9, 1949, and that even at the ex parte hearing of November 11 from which the Government was excluded, the court at first did "not want to hold that that was a personal appearance by the defendants" (R. 11342).

It is difficult, in any event, to understand the point of the finding, since the non-resident defendant Fahey, who was at that time no longer a member of the Board, was not subject to the Board's order, and the persons constituting the Board members at the time Order No. 388 was issued were sued only in their "official capacity" (R. 2771, 3185, 4547-8). The action against them, therefore, was plainly an unconsented suit against the United States and the Board was without power to submit the Government to suit. *Carr* v. United States, 98 U. S. 433. No action is maintainable against the United States for damages save under the Tort Claims Act, which expressly excludes actions based on either abuse of discretion or deceit, and which thus exclude claims such as those alleged in the Mallonee action, based on alleged fraud. (28 USC 2680). It was presumably for this reason that the Tort Claims Act was not invoked as a basis for jurisdiction in any of the pleadings, and was not even mentioned throughout these protracted proceedings, until the hearing of November 8, 1949, and then only by shareholders' counsel (R. 11125).

E

NONE OF THE ORDERS HERETOFORE ENTERED BY THE COURT BELOW PRIOR TO THE INJUNCTION ON APPEAL AFFORD ANY BASIS FOR FURTHER MAINTENANCE OF THE MALLONEE ACTION.

1. *None of such orders are res judicata*

The court below, in finding 62, held that in the prior proceedings "during the three and one half years in which the litigation has been pending" there had been various orders issued containing findings of fact, which orders and the findings therein have become "final," and "as to the matters and things therein covered, are res judicata." (R. 8274-5)

If the court below intended to hold that any of the issues decided by the court below in issuing the injunction on appeal are *res judicata,* the finding is plainly erroneous as a matter of law. The only material issues are whether the court below had jurisdiction over the persons of the nonresident defendants for any purpose, and whether any of the pleadings state a claim for relief within the jurisdiction of the court below. None of the orders issued by the court below, or the findings made therein conclude the appellants on these issues, or on the defenses herein asserted, including the immunity of Government officials from damage claims based on alleged malice, the failure of the Association to exhaust its administrative remedy, the validity of the order appointing the Conservator on the admitted facts, or the nonreviewability of that order on the facts alleged.

The governing principles are simple and familiar. The "rules of res judicata are not applicable where the judgment is not a final judgment" (Restatement, Judgments, Sec. 41), and a "judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action." *Id.* Sec. 68(2). Tested by these settled principles, none of the orders heretofore entered by the court below are res adjudicata of any matter raised on this appeal.

The orders of the District Court overruling the appellant's motions to dismiss or for summary judgment, including both the orders entered on November 10, 1947 (R. 2793) and those entered on October 17, 1949 (R. 7959), were, of course, purely interlocutory and "being interlocutory" were "subject to reconsideration" *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U.S. 261, 267.

The orders specifically referred to in Finding 62 are likewise none of them res adjudicata of any issue on this appeal.

The first of these, that of January 23, 1948, was final, it may be assumed, insofar as it ordered the termination of the conservatorship. *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120; *Bank of Lewisburg* v. *Sheffey,* 140 U.S. 445. It was plainly interlocutory, however, and not final, as respects all other provisions, including those relating to the Conservator's accounting. *Republic Natural Gas Co.* v. *Oklahoma,* 334 US 62, 68.

None of the findings made by the court in connection with so much of the order as terminated the conservatorship even touch upon any issue involved in this appeal. The order was entered on petition of the shareholder plaintiffs "for an order of the court *approving, confirming and interpreting* the Resolution and Order No. 388 of the Home Loan Bank Board, dated January 17, 1948." (R. 8310) (italics supplied) The order itself in terms purports to *enforce* Board Order No. 388 of January 17, 1948, is directed solely to the then Conservator, and thus does not in any way involve any of the issues sought to be raised in the Mallonee action, which *contests* the validity of the *original order* appointing the Conservator, dated May 20, 1946. In fact, nowhere in the Court's Order of January 23, 1948, is there any finding or conclusion with respect to the jurisdiction of the court below over the persons of the nonresident defendants or of the subject matter of the Mallonee action, or as to whether the complaints or cross claims therein state any claim for relief within the jurisdiction of the court below.

The next order, that of March 13, 1948, was entered pursuant to the motion of the Association to impound the notes

evidencing a loan of $6,300,000 from the San Francisco Bank to the Association during the conservatorship, together with the collateral pledged to secure the same. This order expressly recites that it is "interim in nature" and does "not presently determine the situation concerning such indebtedness" i.e., the indebtedness of the Association to any of the Federal Home Loan Banks involved (R. 8519). The Court expressly declared that "Neither this paragraph nor any part of this order is intended to, nor does it, adjudicate or determine or decide any of the claims, *defenses,* demands, set-offs, accounts, counterclaims or other items or charges between any of the parties hereto" (R. 8522) (italics supplied), except that it did limit the claim of the San Francisco Bank to the principal sum demanded by it, namely $6,300,000, with interest at the rate of two per cent, a matter not disputed by any party.

All of the remaining orders were entered after March 19, 1948, the effective date of Federal Rules of Civil Procedure 54 (b), which permits the entry of a "final judgment" on less than all of the claims presented in one action "only upon an *express* determination that there is no just reason for delay and upon the *express* direction for the entry of judgment," and further provides that "in the absence of such determination and direction, any order * * * which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is *subject to revision at any time* before the entry of judgment adjudicating all the claims." (italics supplied) None of the subsequent orders set forth in Finding 62 contained any such finding or direction. *Martineau* v. *City of St. Paul,* 172 F. (2d) 777; *Kuly* v. *White Motor Co.,* 174 F. (2d) 742.

Moreover, they are not res judicata of any issue on appeal for other independent reasons. The order of March 26, 1948, the third of those referred to in Finding 62, purports to transfer the "claim" of the San Francisco Bank from the notes and trust deeds (impounded by the order of March 13) to some $6,500,000 of moneys and U.S. Government bonds deposited in court as collateral, and to cancel

any endorsements to the Bank on the notes and trust deeds. The sole justification for the order, however, and the only material finding made was that the order was necessary to avoid undue expense in clearing title to borrowers' homes (R. 8528-8531). There is no finding whatever which even touches on the jurisdiction of the court below over the non-resident defendants or on any of the questions going to the right of plaintiffs and cross-claimants to maintain the Mallonee action for damages or to determine whether the San Francisco Bank loan of $6,300,000 is a binding obligation of the Association or to secure any of the other relief sought upon the termination of the conservatorship. The appellant San Francisco Bank does not, of course, make any claim to the notes and trust deeds released, because they constituted excess collateral which the Bank would have released from pledge on demand without court order (R. 10437, 8530-1).

The other orders referred to, those of July 30, 1948, and February 2, 1949, were themselves expressly designated "interlocutory," or "preliminary," injunctions (R. 8362, 8372, 8377) issued against ten Northern Federal Savings and Loan Associations and two shareholders of the Long Beach Association respectively, enjoining the maintenance by those parties of certain independent proceedings in other courts during the pendency of this litigation. Moreover, the nonresident defendants were not parties to either of these injunctive proceedings, were not enjoined or otherwise affected by the orders and of course had no right of appeal therefrom. In the former, no finding as to the jurisdiction of the court was made and certainly no ruling was entered on the sufficiency of the complaint and cross-claims in the consolidated actions. In the latter, none of the appellants was enjoined and the Court below made it plain that neither in that order nor in any other previous order had the court ever intended to conclude these defendants on any of the issues now raised on this appeal. In enjoining the maintenance of the shareholders' action in the State Courts, the court held that the action enjoined "involved and will be involved as issuable facts in the cases which

are pending in this Court and which I have already held are appropriately filed, *unless I should grant the motion as to the official defendants,"* (R. 8380) (italics added), a reference to the prior motion of the nonresident defendants to dismiss the Mallonee action and the cross-claims therein, as well as themselves from the action, motions which were not decided or overruled until October 17, 1949 (R. 7959).

The court's findings elsewhere refer also to orders entered in the 50 or more borrower-intervention proceedings (Fdg. 82, R. 8287). It may be assumed that those orders, insofar as they directed the issuance of reconveyances to the borrower-intervenors, were final. None of such orders, however, are res adjudicata as to the claims involved in the complaint or any of the cross-claims in the Mallonee action, for the reason that such complaint and cross-claims involved wholly different causes of action, and none of the material facts or issues in the Mallonee complaint or cross-claims were actually litigated or decided in the borrower-intervention proceedings. Moreover, the orders in the intervention proceedings expressly provide that "the rights heretofore existing of each and every party to this action (except the borrower-intervenor), be and the same are hereby expressly reserved and preserved without prejudice." (See *e.g.* R. 527, 2869).

Finally, the order of September 2, 1947, making interim allowances for attorney's fees to plaintiff shareholders, merely found that the court had "jurisdiction of the persons and subject matter *involved"* (R. 2354) (i.e. for the purpose of ordering an interim allowance out of funds deposited in court), and contained no other findings material to any of the issues raised on this appeal. Moreover, it was plainly not intended to be final save as to the interim allowance then made. In its opinion authorizing the allowance, the court expressly stated: "I think that if the time comes when the total value of their earnings should be appraised, that perhaps it should be explored more by way of oral testimony and opportunity of cross-examination, which the resistor (Ammann) could have had here at this

time if they chose to factually oppose this, but they chose not to do at this time''.[15] Moreover, the order was rendered moot by the termination of the Conservator's appointment; the dismissal of his appeal in these circumstances (R. 8291, n.) is a further reason why the order is not res judicata.

A further interim allowance of attorneys' fees was made in May 1949, (R. 6543) but the order expressly states that it was without prejudice to the rights, claims, or defenses of any party in further proceedings (R. 6541).

2. *The deposit in court of some $14,000,000 of assets pursuant to certain of such orders likewise affords no basis for the further maintenance of the Mallonee action or any cross-claims therein.*

In the course of prior proceedings, some $14,000,000 of assets were deposited or impounded in the registry of the court below, as follows:

> 1. Approximately $1,600,000 were deposited in 50 borrower-intervention proceedings. (R. 8291, n.). The money thus deposited in court was substituted for the reconveyances previously deposited by Title Service Company in connection with its ''cross-claim in interpleader'', and, subject to such substitution, the rights of all parties (other than the borrower-intervenors) were ''reserved and preserved without prejudice'' (R. 527).
>
> 2. By orders of March 13 and March 26, 1948, notes evidencing a loan of $6,300,000 from the San Francisco Bank to the Association during the conservatorship were impounded in court, together with the Association's notes and trust deeds and Government bonds pledged to secure the loan, and the pledge was ''lifted'' from the notes and trust deeds and ''transferred'' to the bonds and most of the money (R. 8533-4). These orders were entered in connection with the Association's claims that the loans were unauthorized and void, and that a controversy existed between the Los Angeles and San Francisco Banks as to which was lawfully entitled to the amount, if any, equitably owing

[15] Unpublished opinion of April 7, 1947, reprinted in *Ex parte Fahey,* 133, Misc. U.S. Sup. Ct., Oct. Term 1946, Record, p. 153, 154.

from the Association by reason of actual benefits which it derived from the loan (R. 8404-5).

3. George Turner deposited in court a total of $18,-503.52, as rent due the Association, in connection with his so-called "cross-claim in interpleader" (R. 8290).

4. The Association deposited in court a total of $36,487.25 as disputed insurance premiums claimed by the Federal Savings and Loan Insurance Corporation, in connection with its petition "in the nature of interpleader" of April and May, 1949 (R. 8266).

The deposit of these assets in court provides no possible basis for further maintenance of the Mallonee action or the cross-claims therein. The Title Service Company's interpleader was an improper collateral attack on the Conservator's appointment, and should be dismissed, (see *supra,* p. 36). The $1,600,000 of money deposited in court in connection therewith is the property of the Association, subject to the pledge to the San Francisco Bank.

The notes evidencing the Bank loan of $6,300,000, and all collateral securing same should be returned to the San Francisco Bank since the Association can neither contest the authority of Ammann to make the loan, as we have shown above (*supra,* pp. 50-53), nor question the validity of the orders dissolving the Los Angeles Bank, as we show in Point II below, on which the alleged dispute between the Los Angeles and San Francisco Bank is based.

The George Turner and insurance premium "interpleaders" likewise state no claim for relief whatever, as shown above (see *supra,* pp. 41-42), and should therefore be dismissed with a return of the funds to the purported "stakeholders".

The objection to the proceedings in which these funds were deposited, it should be noted, goes not merely to the sufficiency of the several interpleaders to warrant service on the non-resident defendants under 28 USC 1335, 2361, but to the fundamental lack of any basis for obtaining any judicial relief whatever, including that sought against the San Francisco Bank and the Conservator, personally served in California.

II

The Complaints in the Consolidated Actions, Insofar as They Relate to the Orders of March 29, 1946, State No Claim for Relief Within the Jurisdiction of the Federal Courts

The Complaint in the Los Angeles case is set forth in two counts, count 1 on behalf of the former Los Angeles bank and count 2 on behalf of six associations, former members of the bank. Count 1 alleges that on March 29, 1946, the Federal Home Loan Bank Administration issued three orders, dissolving the Federal Home Loan Bank of Los Angeles, readjusting the Eleventh Home Loan Bank District to include the territory of the Twelfth District formerly served by the Bank of Los Angeles, renaming the Bank of Portland the Bank of San Francisco with headquarters at San Francisco, California, and transferring all assets and liabilities of the Bank of Los Angeles to the Bank of San Francisco. It alleges further that prior to the issuance of the orders in controversy, a dispute had arisen with respect to the selection of a president of the Bank of Los Angeles; that the defendant John H. Fahey, then Commissioner of the Federal Home Loan Bank Administration, had insisted on the selection of a president of his own choosing and in disregard of the desires and wishes of the industry; and that, to resolve the resulting impasse, the defendant Fahey, without hearing or prior notice to the Bank of Los Angeles, arbitrarily issued the orders in controversy, not for the purpose of promoting the more efficient and economical administration of the Home Loan Bank System, but for the arbitrary and unlawful purpose of promoting the defendant Fahey's control and domination of the banking system (R. 9466, *et seq.*).

Count 2 realleges the allegations of Count 1 and further alleges that the associations were the owners of certain assets in the custody of the former Los Angeles Bank, some of them in "safe keeping" and some as collateral for loans by the Bank to the associations, and were also the owners of shares of stock in the former Bank of Los Angeles and that the transfer of these assets to the San Francisco Bank and purported substitution of stock in the latter bank for

that formerly held in the Los Angeles Bank constituted a trespass on the property of the plaintiff associations and a cloud on their title thereto (R. 9485-9492).

The only relief prayed for in the Los Angeles action was a decree invalidating the orders in controversy and restoring the assets of the Bank of San Francisco to their allegedly true owners or custodian, the Bank of Los Angeles.

In the Mallonee action, both the shareholders' complaint and the Association's cross-claim attempt to raise questions with respect to the validity of the orders of March 29, 1946 (R. 3059-3084, 3309-3326). Both pray for declaratory relief adjudging the equitable obligations, if any, of the Association by reason of the loans made from the San Francisco Bank to the Association during the conservatorship; to which of such Banks the Association's obligations, if any, are owing; and in which Bank the Association is a shareholder (R. 3093, 3336). Insofar as the Mallonee action seeks to draw in question the validity of the orders of March 29, 1946, it raises questions similiar to those in the Los Angeles action.

The legal issues thus raised in the consolidated actions are narrow in compass. No question could be raised as to the statutory authority of the Federal Home Loan Bank Administration, now the Home Loan Bank Board, to dissolve an existing Bank. Such power, though withheld from the Federal Reserve Board (30 Op. Atty. Gen'l 497), was expressly conferred on the Home Loan Bank Board (Federal Home Loan Bank Act, Sections 25 and 26, 12 U.S.C. 1445, 1446). It is contended, however, that the exercise of the power is conditioned by Section 26 on a finding by the Home Loan Bank Board that "the efficient and economical accomplishments of the Federal Home Loan Bank Act will be aided by such action" and it is alleged that defendant Fahey made no such finding and was not of such an opinion; that his purported finding to such effect in the orders in controversy were in legal effect a "sham and a fraud". It is further contended that the exercise of such authority without notice or opportunity for hearing is a violation of the due process clause of the Fifth Amendment.

These contentions are all without merit. The finding of the Home Loan Bank Administration as set forth in the orders in controversy is not open to judicial review, and the Constitution requires no hearing as a condition of the exercise of the powers granted. Furthermore, the complaints are fatally defective for the reasons that neither the former Los Angeles Bank nor its former association members have any justiciable interest sufficient to call in question the validity of the orders in judicial proceedings; the Home Loan Bank Board members are in any event indispensable parties to the granting of relief prayed for and have not been and cannot be duly served; and finally, the action is an unconsented suit against the United States.

A

THE FINDING OF THE HOME LOAN BANK ADMINISTRATION THAT THE ORDERS IN CONTROVERSY WOULD "AID THE EFFICIENT AND ECONOMICAL ACCOMPLISHMENT OF THE PURPOSES OF THIS ACT", THOUGH MADE WITHOUT HEARING, IS NOT OPEN TO JUDICIAL REVIEW

The argument that the plaintiffs were denied due process because of failure to accord them a hearing would seem to require no extended consideration. Under the express provisions of Section 25 of the Federal Home Loan Bank Act, the former Los Angeles Bank was granted a charter with corporate succession "until dissolved by the Board under this Act," (12 USC 1435, *infra,* App. A, p. 128), and the plaintiff shareholders voluntarily became members of the Bank as constituted. There can be no contention that the Act requires a hearing of any kind as a condition precedent to such dissolution. The plaintiffs are therefore estopped to question the validity of the Act in authorizing dissolution without hearing. "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits," *Ashwander* v. *T. V. A.,* 297 U. S. 288, 348 (per Brandeis, J. concurring); *Fahey* v. *Mallonee,* 332 U. S. 245, 255; *Eliason* v. *Wilborn,* 281 U. S. 457, 459-460; *Booth Fisheries Company* v. *Industrial Com. of Wis.* 271 U. S. 208; *Interstate Consolidated Street Ry. Co.* v. *Massachusetts,* 207 U. S. 79, 84; *Grand Rapids and Indiana Ry. Co.* v. *Osborn,* 193 U. S. 17, 29; *Nuckolls* v. *United States,* 76 F.

(2d) 357, 360; *American Bond and Mortgage Co.* v. *United States,* 52 F. (2d) 318, 321-322.[16]

The question remains whether the administrative finding pursuant to which the Los Angeles Bank was dissolved, is subject to judicial review. The question presented is solely one of statutory construction. Congress may delegate to the Home Loan Bank Board the power to make the final determination as to whether the efficient and economical accomplishment of the Federal Home Loan Bank Act would be aided by the liquidation of a bank. *Kennedy* v. *Gibson,* 8 Wall. 498; *United States* v. *Wright,* 11 Wall. 648. Moreover, both the Bank and its Association members are estopped to question the validity of the Act, if construed to withhold the right to judicial review. *Booth Fisheries Company* v. *Industrial Com. of Wis., supra*; *Fahey* v. *Mallonee, supra.* Thus, the sole question here is: Has Congress withheld such right? It is submitted that no other conclusion is possible.

Neither the Federal Home Loan Bank Act nor any other Act of Congress makes provision for judicial review of the findings of the Federal Home Loan Bank Board or Administration entered pursuant to Sections 25 and 26 of the Act, and "where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved."

Switchmen's Union of N. A. v. *Nat. Mediation Board,* 320 U. S. 297, 303;

Louisiana v. *McAdoo,* 234 U. S. 627, 633;

United States v. *Bush & Co.,* 310 U. S. 371;

Chicago & So. Airlines v. *Waterman S. S. Corp.,* 333 U. S. 103, 111.

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[16] Were the question open for consideration, it seems clear that no such hearing is required. The statutes authorizing the appointment of receivers by the Comptroller of the Currency and the liquidation of national banks and assessment of their shareholders, when the Comptroller deems any such bank insolvent, have never required a hearing, nor have any been accorded. Act of June 30, 1876, 19 Stat. 63 (12 USC 191) The validity of the Comptroller's power as thus conferred is not open to question. *Bushnell* v. *Leland,* 164 U. S. 684; *Kennedy* v. *Gibson,* 8 Wall. 498; *State Savings & Commercial Bank* v. *Anderson,* 238 U.S. 611, aff'd. 165 Cal. 437; see also *Buttfield* v. *Stranahan,* 192 U.S. 470, 497. The comptroller's duty to make a "finding" implies no duty to accord a hearing. *Adams* v. *Nagle,* 303 U.S. 532, 540.

Thus it "has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review."

United States v. *Bush & Co.,* 310 U. S. 371, 380;
Martin v. *Mott,* 12 Wheat. 19;
Dakota Central Tel. Co. v. *South Dakota,* 250 U. S. 163;
United States v. *Chemical Foundation,* 272 U. S. 1.

The courts are particularly reluctant to infer an intention to subject administrative orders to judicial review where the facts on which they must be based "can only be known to an official or a body having wide experience in such matters and ready access to the means of information", and where any conclusions reached are "not entirely susceptible of proof or disproof," (*Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, 561), or are "delicate, complex, and involve large elements of prophecy," (*Chicago and South Airlines* v. *Waterman Steamship Corp.,* 333 U. S. 103, 111) or must be based on "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath consciousness without losing their worth" (*Chicago, B. & Q. R. Co.* v. *Babcock,* 204 U. S. 585, 598). The few cases in which the Courts have found an intention to confer "a statutory privilege protected by judicial remedies", are not even remotely similar on their facts.

Stark v. *Wickard,* 321 U. S. 288, 306;
Federal Reserve System v. *Agnew,* 329 U. S. 441.

The terms of the Federal Home Loan Bank Act and the considerations which must necessarily guide the Board (or Administration) in making its "finding" pursuant thereto require the conclusion that Congress intended to commit to the sole discretion of the administrative agency the question of the proper number of Banks. The authority to "liquidate and reorganize" (Sec. 26) any Bank was deliberately granted, as Representative Hancock, Vice-

Chairman of the House Committee on Banking and Currency explained, so that "the number of banks may later be decreased by the board if the volume of business does not justify the original 12" (75 Cong. Rec. 12609).

The criteria established for designating the original districts and any later reduction in the number of Banks, including the "convenience" of likely members (Sec. 3) and "efficiency" and "economy" in accomplishing the "purposes of the Act" (Sec. 26) plainly refer to matters "not entirely susceptible of proof or disproof" (*Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, 559, *Chicago, B. & Q. R. C.* v. *Babcock,* 204 U. S. 585, 598), on which judgment must necessarily involve "large elements of prophecy" (*Chicago and South Airlines* v. *Waterman's Steamship Corp.,* 333 U. S. 103, 111).[17]

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[17] The prior experience in the establishment of the Federal Reserve System, which presumably guided the Congress in enacting the Federal Home Loan Bank Act, confirms that any determination as to the number of banks must, within the prescribed minimum of eight and maximum of twelve, be committed to final administrative discretion. The criteria adopted in selecting appropriate districts with "due regard to the convenience and course of business" of likely members of the Federal Reserve System were described by a former member of the Federal Reserve Board as follows:

"First. The ability of the member banks within the district to provide the minimum capital of $4,000,000 required for the Federal Reserve bank, on the basis of 6 per cent of the capital stock and surplus of member banks within the district.

Second. The mercantile, industrial, and financial connections existing in each district and the relations between the various portions of the district and the city selected for the location of the Federal Reserve bank.

Third. The probable ability of the Federal Reserve bank in each district, after organization and after the provisions of the Federal Reserve Act shall have gone into effect, to meet the legitimate demands of business, whether normal or abnormal, in accordance with the spirit and provisions of the Federal Reserve Act.

Fourth. The fair and equitable division of the available capital for the Federal Reserve banks among the districts created.

Fifth. The general geographical situation of the district, transportation lines, and the facilities for speedy communication between the Federal Reserve bank and all portions of the district.

Sixth. The population, area and prevalent business activities of the district, whether agricultural, manufacturing, mining or com-

In ascertaining the "convenience" of members, moreover, it was anticipated that those concerned would resort to the familiar means of making their "convenience" known. As Professor Willis, the technical consultant on organization of the Federal Reserve Banks and Secretary of the Federal Reserve Board during the formative years 1914 to 1918, has aptly observed, the great question in dividing the nation into Reserve Districts is simply "with what minimum attention to economic requirements can political necessities be satisfied?" Willis, *The Federal Reserve System,* p. 563 (1923). With the experience of the administration of the Federal Reserve Act before it, the Congress enacted the Home Loan Bank Act with full knowledge that such was indeed the crucial issue to be resolved in establishing bank districts. As Senator Fess said in discussing on the Senate floor the bill for the creation of the Federal Home Loan Banks: "We shall have to do it by placing the authority to abolish them [Federal Home Loan Banks] somewhere where it can be done without reference to the influence that it would run up against." 75 Cong. Rec. 14580 (1932).

The political considerations in turn have a direct and vital bearing on the sound financial operation of the banking system. It was early observed in the administration of the Federal Reserve System that:

> "In the light of recent experience much justification is afforded the view that the regional system is peculiarly susceptible to undue credit expansion. Local pressure for enlarged credit gains is always most intense. Business thrives on easy money; rising prices usually create the situation of a widening margin between costs of production and sale proceeds. Those who are injured by price inflation, those whose money incomes are incapable of quick adjustment, exert only feeble pressure upon the banking administration * * * Because of the nature of things, it is peculiarly

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mercial, its record of growth and development in the past, and its prospects for the future."

Clark, *"Central Banking Under The Federal Reserve System"* pp. 52, 53 (1935).

> necessary that the banking structure be such as to make easy denial of demands for excessive credits. It is necessary that banking control be lodged in the hands of those well equipped to resist the credit demands of those whe are not responsible for the interests of all classes in society, and who do not have in mind merely the short-time requirements of business."

Reed, *"The Development of Federal Reserve Policy"* (1922) pp. 5-6.

These observations are of peculiar force as applied to the Los Angeles Bank at the time the orders of controversy were issued and thereafter in view of the unprecedented boom in real estate and mortgage credit in the area of that bank during the post-war years.

Even the mere economic considerations which must be weighed in determining the proper area to be included in a single geographical area are addressed to purely administrative direction. *Chicago and So. Airlines* v. *Waterman's S. S. Corp.,* 333 U. S. 103, 111, (*Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, 559. Thus in the case of the Federal Reserve System, it has been forcefully suggested that "Districts covering a territory diversified in climate and in the nature of their industries may be able more easily to finance exceptional demands in one part by reliance upon surplus funds in another without drawing heavily upon other districts", and that "A section thus diversified is Number 12, the Pacific Coast Section, including States from the Canadian border to the boundary line of Mexico." (Reed, *"The Development of Federal Reserve Policy",* p. 12). This district, it is of interest to note, is almost identical with that created by the orders in controversy.

It is thus for the Board (or its predecessor, the Administration) to determine finally the number of Banks, within the limits of the statutory minimum and maximum, needed for the "convenience" of member institutions and the "efficient and economical" accomplishment of the purposes of the Act.

In issuing its orders of March 29, 1946, dissolving the Los Angeles Bank, the Administration expressly found that "it has been and is hereby determined that the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action contemplated herein" (App. C, *infra* p. 169). The allegation that the finding thus set forth in the orders in controversy, though expressly recited therein, was not in fact made and does not in truth reflect the real purpose of the Administration in issuing the orders. (R. 9479-80), presents no issue for judicial review. Where, as here, the matters are committed for decision in the sole discretion of an administrative agency "The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts." (*United States* v. *Chemical Foundation,* 272 U. S. 1, 15). As the court observed in *Dakota Central Tel. Co.* v. *South Dakota,* 250 U. S. 163, 184:

> "The proposition that the President, in exercising the power, [to take over telephone lines and fix rates] exceeded the authority given him, is based upon two considerations: First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power."

B

NEITHER THE FORMER LOS ANGELES BANK NOR THE COMPLAINANT ASSOCIATIONS HAVE ANY STANDING TO SUE.

Courts are open only for the redress or prevention of the invasion of legally protected private rights. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *Tennessee Electric Power Co.* v. *TVA,* 306 U. S. 118; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464; *Massachusetts* v. *Mellon,* 262 U. S. 447.

As the Supreme Court said in *Tennessee Electric Power Co.* v. *T. V. A., supra* at 137:

> "The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

Tested by these principles, neither the former Los Angeles Bank nor any of its former member associations have any standing to sue.

1. *The Los Angeles Bank has no standing to sue.*

The Bank was created as an agency of the United States organized for the sole purpose of carrying on "important governmental functions" (*Smith* v. *Kansas City Title and Tr. Co.,* 255 U. S. 180; *Federal Land Bank* v. *Gaines,* 290 U. S. 247; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95), not for any private purposes or objects, but only as an instrument for carrying into effect the powers vested in the government of the United States (*Federal Land Bank* v. *Bismarck Lumber Co., supra; Osborn et al.* v. *The Bank of the United States,* 9 Wheat. 738, 860).

The sweeping grant of powers to the Board over Federal Home Loan Banks plainly negative any intention that the grant of corporate existence to the Los Angeles Bank should "create" a statutory privilege protected by judicial remedies", *Stark* v. *Wickard,* 321 U. S. 288, 306. The Bank and the district which it served were initially created in the sole discretion of the board (Sec. 3; 12 U.S.C. 1423); during its lifetime, the Bank was directed to act only "subject to the approval of the Board" (Sec. 12; 12 U.S.C. Sec. 1432) and could be required without its consent to assume the obligations of consolidated debentures of all the Banks or otherwise extend credit to the other Banks, as the Board might direct (Sec. 11; 12 U.S.C. Sec. 1431); and was given succession only "until dissolved by the board" (Sec. 25; 12 U.S.C. Sec. 1445).

2. *The Associations formerly members of the Los Angeles Bank have no standing to sue.*

Any savings and loan associations organized under the laws of the United States or any State, is eligible by statute to become a member of "a" Federal Home Loan Bank (Sec. 4, 12 U.S.C. 1424), but neither the Federal Home Loan Bank Act nor the Home Owners Loan Act of 1933 confer on such association any right to be a member of any particular Bank in perpetuity. On the contrary, each member financial institution of the Bank acquired its membership and stock under a law which specifically subjected it to the power of the Board to discontinue any bank, including the one in which it holds its membership. Secs. 3, 25, 26, 12 U.S.C. 1423, 1445, 1446. Whatever statutory rights a shareholder has to be a member of some bank, it acquired and has no legal right to continue its membership in any particular bank. For when the statute vested in the Board the power to liquidate a bank, it specifically denied to the members any right to maintenance of membership in a particular bank. Consequently, because no right to maintenance of membership in the Los Angeles Bank existed no right of a stockholder was violated when his membership was transferred to the San Francisco Bank. And because no right was violated, the members have no standing to sue. *Perkins* v. *Lukens Steel Co., supra,* 310 U. S. 113; *Tennessee Electric Power Co.* v. *TVA, supra,* 306 U. S. 118.

Nor did the transfer to the San Francisco Bank of the collateral for loans and of the cash and bonds of the stockholders of the former Los Angeles Bank invade any legal right of the shareholders of the former Los Angeles Bank. The transfer alone was no invasion of a legally protected interest since the association shareholders in the former Los Angeles Bank had no right to membership in any particular bank. Their purchases of stock in that Bank and deposit of assets or collateral therewith were made as a condition of bank membership (*Peoples Bank* v. *Federal Res. Bd. of S. F.,* 58 F. Supp. 25) which by statute was subject to transfer at the Board's direction (Sec. 6; 12 U.S.C. 1426 (h) (j)), and do not confer a proprietary inter-

est in the Bank of any kind. *Peoples Bank* v. *Federal Res. Bk. of S. F.*, 58 F. Supp. 25. Whatever the associations' property rights in their shares of stock or in the assets deposited with the former Los Angeles bank, however, they were in no wise impaired by the orders in controversy. There is no allegation that the per share surplus of the Portland Bank was less than that of the Los Angeles Bank or that the resulting per share surplus of the San Francisco Bank was less than that of the former Los Angeles Bank. Nor is it alleged that the plaintiff associations have made any demand on the San Francisco Bank to redeliver the deposits of bonds and cash held by the Bank "in safekeeping" for the Association, or to redeliver the collateral pledged by such associations upon payment of the loans secured thereby, or to retire the stock of any shareholder pursuant to the provisions of the statute (Sec. 6; 12 U.S.C. 1426(i)) or that the San Francisco Bank has refused to do so on such demand.

The plaintiff association's only grievance, in fact, is that, by virtue of the consolidation of the former Los Angeles and Portland Banks, the California member associations lost the voting control which they had theretofore possessed in respect of the former Los Angeles Bank under the Board regulations, requiring a minimum representation on the Bank board of directors of at least one elective member for each state included in the district, 24 C.F.R. 22, Sec. 122.32. As the only other areas included in the former Twelfth District were the two sparsely populated states of Nevada and Arizona and the Territory of Hawaii, California associations, and particularly the associations of Southern California, were in a position to elect at least half of the board of directors of the former Bank of Los Angeles, an advantage no longer available to them in the new Eleventh District, which includes nine states and two territories, each of which is entitled to one Board member.[18] The advantage, however,

[18] There are only eight elected board members, hence the Board has treated the States of Arizona and Nevada as one for this purpose and have not accorded minimum representation to the two territories. App. C, *infra*, p. 170.

which the California associations formerly enjoyed in the control of the former Los Angeles Bank was not one to which they were entitled as of right under the Home Loan Bank Act, but was merely the incidental result of the original districting of the United States and of the Twelfth District in conformity with the sole discretion of the Board. Secs. 3, 7; 12 U.S.C. 1423, 1427. The loss of such advantage, therefore, was in no wise an invasion of the legally protected rights of the California associations. *Sprunt & Son* v. *United States,* 281, U. S. 249; *Edward Hines Yellow Pines Trustees* v. *U. S.,* 263 U. S. 143, 147, 148; *U. S.* v. *Merchants & Mfgrs. Traffic Asso.,* 242 U. S. 178, 188.

C.

THE COURT BELOW LACKED JURISDICTION OVER INDISPENSABLE PARTIES

1. *The Home Loan Bank Board and its members are indispensable parties to the maintenance of the Bank action.*

In so far as the consolidated actions seek to invalidate the order revoking the charter of the former Los Angeles Bank, it is at most an action to enforce a contract, the corporate charter (*Dartmouth College* v. *Woodward,* 4 Wheat. 518; *Charles River Bridge* v. *Warren Bridge et al.,* 11 Pet. 420; *U. S.* v. *Knox,* 102 U. S. 422), to which the Board, as party to the contract, must be joined. *Shields* v. *Barrow,* 17 How. 130; *Nat. Licorice Co.* v. *Nat. Labor Rel. Bd.,* 309 U. S. 350, 363.

In so far as the actions seek the return of the assets transferred to the San Francisco Bank, the Board is likewise an indispensable party. The Banks have only such powers as are granted to them by the statute. The Court cannot endow them with additional powers. By the statute every power granted to the banks may be exercised and enjoyed "subject to the approval for the Board". Sec. 12; 12 U.S.C. 1432. To require or empower a Bank to take or hold property, to issue shares of stock, or to take any other action in connection with the reestablishment of the Los Angeles Bank or the acquisition by it of the assets referred to by the plaintiffs would, under the statute, be

utterly ineffective unless the acts done pursuant thereto be approved by the Board. For, as previously observed, the Banks may exercise no authority or power except "subject to the approval of the board." To act independently of Board approval is beyond the statutory powers of the Bank, and the Court cannot authorize or compel a bank to exercise powers which the statute denies to it.

Restoration of the Los Angeles Bank, it should be emphasized, is not a matter of legal theory, but an intensely practical affair. The Bank, if restored, must have the active cooperation of the Board in order to function as intended under the Federal Home Loan Bank Act. The Board would have to conduct the election of officers and directors, approve the persons elected (Sections 7, 12; 12 U.S.C. 1427, 1432), provide funds from the Board's bond issues to finance the Bank's operations (Sec. 11, 12 U.S.C. 1431), and otherwise utilize the Bank as an integral part of the system.

The courts can compel this, if at all, only by the exercise of personal jurisdiction over the Home Loan Bank Board members. And the courts, of course, will not enter a merely futile decree whatever its theoretical jurisdiction to do so. *Wilhelm* v. *Consolidated Oil Corp.,* 84 F. 2d 739.

In sum, no judgment of the Court attempting to provide the relief which the plaintiffs seek could be effective except as it compelled action by the Home Loan Bank Board. No subordinate subject to the jurisdiction of the Court has the power or authority to perform the acts that would be required of the Board to effectuate any decree that might be entered granting any relief which the plaintiffs seek. Without Board action such a decree would operate in a vacuum and could at most be only an advisory opinion. It would not be a "decree of a conclusive character" granting "specific relief". *Cf. Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 241. Hence, the Board is an indispensable party to the Bank action. *Williams* v. *Fanning,* 332 U. S. 490; *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86; *Daggs* v. *Klein,* 169 F. 2d 174 (9th Cir.).

2. *Valid service on the Board or its Members was not had.*

Admittedly, neither the Home Loan Bank Board nor its members were ever served in the State of California, nor, as shown above (see *supra,* page 79,) did they ever submit to the jurisdiction of the court. The attempt to bring them within the jurisdiction of the court, based upon 28 U.S.C. 1655 (formerly Sec. 118), was unavailing.

Section 1655 provides that in an action to enforce any lien upon or a claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within a district, the court may order an absent defendant to appear, the order to be served either personally upon the absent defendant wherever found or by publication, and the court may then proceed without the absent defendant "but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action."

The indispensable prerequisite, of course, to the recovery of any property by the Los Angeles Bank or to a declaration of stock ownership in the Los Angeles Bank is the restoration of its charter. For without an existing charter, the Los Angeles Bank has no corporate existence, and there is no one in whose favor a decree restoring property can operate. The action thus comes down to one involving the rights acquired by the Los Angeles Bank and the corresponding duties of the Board under the charter issued to it by the Board and subsequently cancelled by Order No. 5082.

There is thus attempted under the guise of an *in rem* action what it is in fact an action to determine the rights and obligations of an obligee under a contract, and to enforce those rights. It is well settled that that may not be done upon constructive service.

The charter is at most a contract between the Bank and the Board. *Dartmouth College* v. *Woodward,* 4 Wheat. 518; *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420; *United States* v. *Knox,* 102 U. S. 422. The rights and obligations of that contract are the rights and obligations set forth in the Federal Home Loan Bank Act which itself is a part of the contract. *Salt*

Mfg. Co. v. *East Saginaw,* 13 Wall. 373; *Ainsworth* v. *Southwestern Drug Corporation,* 95 F. 2d 172. Whatever rights, if any, the Los Angeles Bank acquired, therefore, to the continuance of its existence derived solely from that charter. There is no other source. And whether or not any of the Bank's rights under the charter were violated and may be enforced against the Board is the question to be determined in the Bank action. Any attempt to recover property must await that determination. *Maya Corporation* v. *Smith,* 32 F. 2d 350 (D.C. Del.); *Kleinschmidt* v. *Kleinschmidt Laboratories,* 89 F. Supp. 869 (U.S.D.C.N.D.Ill.).

But that determination may not be made under Section 1655. An action to determine and enforce rights under a contract is not an action to "enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district". (*Dan Cohen Realty Co.* v. *National Savings & Trust Co.,* 125 F. 2d 288; *Josevig-Kennecott Copper Co.* v. *Howarth,* 261 Fed. 567; *Wilhelm* v. *Consolidated Oil Corp.,* 84 F. 2d. 739), but if it were, it is certainly not maintainable at the domicile of the obligee, the Los Angeles Bank, allegedly located, in California. *Murphy* v. *Ford Motor Co.,* 241 Fed. 134; *Evans* v. *Scribners & Sons,* 58 Fed. 303.

Moreover, Section 1655 authorizes only a judgment *in rem.* No judgment *in personam* may be entered pursuant thereto, whether for injunction *Ladew* v. *Tenn. Copper Co.,* 218 U. S. 357, or specific performance *Dan Cohen Realty Co.* v. *Nat. Sav. & Trust Co.,* 125 F. (2d) 288. Hence, no order could be issued thereunder compelling the Board to give its "approval", as required by the Act to the return of the assets transferred to the San Francisco Bank, the reconstitution of the Los Angeles Bank or to the election of the necessary officers and directors, or the raising of funds or any other act necessary to restore the former Los Angeles Bank as it existed prior to the issuance of the orders in controversy.

A brief word should be added as to the contention advanced by the plaintiff and Association cross-claimant in the Mallonee action that jurisdiction over the non-resident

defendants may be obtained by service under the interpleader statutes, namely Sections 1335 and 2361 of Title 28 USC. The supposed basis for the "interpleader" is that both the Los Angeles and the San Francisco Banks allegedly lay claim to whatever amount is equitably due from the Long Beach Association by reason of the $6,300,000 loan from the San Francisco Bank to the Association during the conservatorship. For the reasons previously set forth, the allegations in the Mallonee action in this respect are wholly inadequate to state a claim of "interpleader" within the coverage of Sections 1335 and 2361. See *supra,* p. 88.

D

THE SUIT IS ONE AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED

The statutory power in the Board to liquidate the Los Angeles Bank is not and, of course, cannot be denied. There is alleged at most a tortious exercise of the power so granted. And the plaintiffs pray that the results of the exercise of the power be undone.

But no decree of a Court which attempts to undo those results can be effective except as it requires specific action by the Board. For even if it be held that the Los Angeles Bank was not dissolved, the Los Angeles Bank can take no action to reacquire the property which it is alleged the San Francisco Bank wrongfully holds nor can it do any other act without the "approval of the board".

Consequently to afford effective relief to the plaintiffs, the Court would have to require specific action by the Board. And any suit for specific relief against an officer or agency of the United States to compel official action is an action against the United States which may not be maintained except with its consent. *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682.

The allegation, assumed arguendo to be sufficiently pleaded, that "said orders * * * and all of the acts * * * done * * * pursuant thereto operated to and did (a) deprive [the plaintiffs] of * * * property without due or any process of law" does not and cannot alter the rule announced in the *Larson* case. For necessarily any

action which the Board might take in relation to the approval of the exercise of Bank powers required of it by statute is governmental. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682.

"Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson* v. *Domestic and Foreign Commerce Corp., supra* at 691, n.

The United States has not consented to be sued herein. Congress refrained from making the Board a suable entity. It is an unincorporated agency of the United States without power to sue or be sued. The statute of the Board's creation therefore gave no consent. *Dept. of Agriculture* v. *Remund*, 330 U. S. 539.

The Administrative Procedure Act, even if that Act is applicable to this case [19], affords no ground for judicial control of the discretionary power of the Board to create and adjust districts and to liquidate or reorganize Federal Home Loan Banks. The right of review granted by that Act runs to "any person suffering legal wrong because of any agency action, or [is] adversely affected or aggrieved by such action within the meaning of any relevant statute". But as has been shown, the plaintiffs had no legal right which was affected by the adjustment of districts or by the liquidation of the Los Angeles Bank. See *supra*, p. 96.

Further, Section 10 of the Administrative Procedure Act exempts from the review provision action which is by law committed to agency discretion, 5 U.S.C. 1009. That the establishment and readjustment of districts and the establishment and liquidation of Banks is by law committed to the discretion of the Board and involves matters beyond

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[19] The Act became effective September 11, 1946, subsequent to the institution of this suit. Cf. United States v. Heth, 3 Cranch 399; United States v. St. Louis S. F. & T. Rr., 270 U.S. 1, 3; Hassett v. Welch, 303 U.S. 303, 314.

the competence of the courts has been shown above. See *supra* p. 90.

Finally, the Administrative Procedure Act does not purport to waive the preexisting immunity of the United States from suit. In general, as previously noted, it merely codifies the theretofore established rules governing the scope of judicial review. See Attorney General's Manual, p. 96; *Larson v. Domestic & Foreign Commerce Corp., supra.* The authority in section 10(e) to compel official action was not intended, it has been held, to enlarge the theretofore existing scope of judicial review. *State Airlines* v. *CAB,* 174 F. (2d) 510, 518. There is, of course, no ministerial duty prescribed by the Federal Home Loan Bank Act to restore the Los Angeles Bank or to restore to it the assets heretofore transferred to the San Francisco Bank.

E

THE ORDERS OF MARCH 29, 1946 DISSOLVING THE LOS ANGELES BANK, IF OPEN TO REVIEW IN THIS PROCEEDING, ARE VALID ON THEIR FACE.

The Federal Home Loan Bank Administration duly determined that the dissolution of the Los Angeles Bank and the transfer of its assets to the Bank of Portland, reconstituted the Bank of San Francisco, would promote the "efficient and economical" accomplishment of the purpose of the Act. The power of Congress to delegate to an administrative agency the power to make such determination is not and cannot be questioned. The courts must, therefore, presume that facts exist which support the determination made by the Administration in issuing the orders in controversy, save as the contrary is "specifically set forth"; allegations "which are merely the general conclusions of law or fact" are insufficient. *Pacific States Box & Basket Co.* v. *White,* 296 U.S. 176, 185. For "the presumption of the existence of facts justifying . . . specific exercise [of duly delegated authority] attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." *Pacific States Box & Basket Co.* v. *White, supra,* at 186. There is nothing in the allegations of the com-

plaint in the Los Angeles case, however, or in the Mallonee case (insofar as the latter touches upon the validity of the orders dissolving the Los Angeles Bank), which specifically negatives the existence of facts which would warrant the finding made by the Administration in issuing the orders in controversy.

The principal purpose of Congress in authorizing the "liquidation or reorganization" of any banks originally created under the Act, was to reduce the number of banks "if the volume of business does not justify the original twelve" (see *supra,* p. 93). There is not a syllable in any of the allegations in this action which even attempts to negative the presumed fact that there was insufficient business to warrant the maintenance of a separate bank for the former Eleventh District covering the states of the Pacific Northwest. This Court, indeed, may take judicial notice that, from the inception of the Federal Reserve System, it was determined that there was insufficient capital or business to warrant the creation of a separate Federal Reserve Bank for that area. Willis, *Federal Reserve System,* p. 585. Nor is there any allegation in the complaints or cross-claims which attempts to negative the presumed fact that the inclusion in one district of the territory formerly divided between the Eleventh and Twelfth districts, would provide a more economically balanced area. The establishment of but one district for this area in the Federal Reserve System has this important advantage, as previously noted (see *supra,* p. 95).

In fact, the only material allegations made in the complaint in the Los Angeles case (or, in the Mallonee action, which touch upon the validity of the orders dissolving the Los Angeles Bank) are that the Los Angeles Bank had itself previously been "efficiently and economically operated and its affairs were in a healthy and prosperous condition" (R. 9476), and that the orders in controversy were issued, not for the reasons expressly recited therein, but for other allegedly improper reasons growing out of a controversy between the Los Angeles Bank and the defendant Fahey as to the selection of a president for the Los Angeles Bank (R.

9477-8). The allegations as to the efficient and economical operation of the Los Angeles Bank do not, of course, even remotely negative the lack of sufficient business to warrant a separate bank for the Pacific Northwest states or any of the other facts which might warrant the finding made by the Administration, and the existence of which this Court must presume unless specifically negatived. The further allegation that the Administration did not in fact make the finding which it purported to make and that it was secretly prompted by other improper motives, presents no question for judicial review. See *supra,* p. 96.

III

Quite Apart from the Foregoing, the Injunction Should Not Have Been Issued

A

THE COURT BELOW LACKED JURISDICTION OVER THE PERSONS OF THE DEFENDANT HOME LOAN BANK BOARD MEMBERS, WITHOUT WHICH THE COURT LACKED POWER TO ISSUE THE INJUNCTION

It is elementary that injunctive relief may be issued only against persons subject to the personal jurisdiction of the Court, and that, accordingly, no injunction may be issued to restrain the institution or continuance of proceedings in another forum in the absence of personal jurisdiction over the parties sought to be enjoined. *Chase National Bank* v. *Norwalk,* 291 U.S. 431, 435, 436-8; *Scott* v. *Donald,* 165 U.S. 107, 117.

The injunction against the Board members cannot, of course, be supported as one to enjoin the Board from "knowingly aiding a defendant in performing a prohibited act" on the theory that in respect of the hearing enjoined, the relation of the Board members to the former Conservator or other parties personally served as defendants is that of "associate or confederate". *Chase National Bank* v. *Norwalk, supra* at 436. Neither the former Conservator nor the San Francisco Bank proposes to conduct the hearing. It is the Board which has ordered the hearing to be held, and this pursuant to its own authority, and not in aid of any

hearing ordered to be held by the former Conservator or the San Francisco Bank. If the court below had secured personal jurisdiction of the Bank Board, it would have had personal jurisdiction to enjoin not only the Bank Board, but "associates from knowingly participating in the hearing enjoined (*cf. Chase National Bank* v. *Norwalk, supra*), but since it is the Board and the Board alone which has ordered the hearing to be held, and since the court below lacked personal jurisdiction over the Board and its members, the court lacked power to enjoin the Board from conducting the hearing.

B

THE ISSUES FOR CONSIDERATION AT THE PROPOSED BOARD HEARING AND ITS OBJECTS WERE NOT THE SAME AS THOSE INVOLVED IN THE PENDING MALLONEE AND LOS ANGELES ACTIONS

It is too clear for argument that the subject matter for hearing under the Board order of September 9, 1949, bears no relation to the subject matter of the Los Angeles action. The Board order relates only to the affairs of the Long Beach Association, while the Los Angeles action is concerned exclusively with the validity of the orders of March 29, 1946, consolidating the reserve banks of the former Eleventh and Twelfth Districts.

There is likewise no such similarity between the issues and objects in the pending Mallonee action and those in the proposed Board hearing as to warrant an injunction against the conduct of the Board hearing. In the view most favorable to plaintiffs, the pending Mallonee action is concerned with damages arising out of the asserted invalidity of the original order of May 20, 1946, appointing a Conservator. The Board order of September 9, 1949, concerns the current operations of the Association and the possibility of taking corrective action in the future. The fact that, in deciding on such possibility, the Board proposes to consider some of the matters that may be involved in the Mallonee action is immaterial, since the objects of the judicial and administrative proceedings are plainly distinct.

The object of the enjoined administrative investigation

and hearing is to determine what, if any, administrative action is necessary in connection with the Long Beach Federal Savings and Loan Association. The administrative proceeding "is a quasi public proceeding, set in motion by a public agency * * *" (*Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 447) in order to determine that agency's governmental responsibilities under the Federal statutes toward the Long Beach Federal Savings and Loan Association. See Sec. 5, Home Owners' Loan Act of 1933, p. —, App. A, 12 U.S.C. 1464. The Court actions, on the other hand, are "merely private suits" (*Pacific Live Stock Co.* v. *Lewis, supra*) to recover damages. It is not enough that some of the matters involved in the Mallonee action may be considered by the Board in the administrative hearing. There is "no substantial identity in the rights asserted and in the purposes sought * * *." *Long* v. *Stites,* 63 F. 2d 855, (6th Cir); *Empire Trust Co.* v. *Brooks,* 232 Fed. 641 (5th Cir.).

The patent case invoked by appellees (*Dwinell-Wright Co.* v. *National Fruit Product Co.,* 129 F. (2d) 848), provides no analogy. There the statutes establish an election between alternative and mutually exclusive procedures for obtaining the same relief. *Hoover Co.* v. *Coe,* 325 U.S. 79; *Hemphill Co.* v. *Coe,* 121 F. 2d 897 (D.C. Cir.); *Chase* v. *Coe,* 122 F. 2d 198 (D. C. Cir.).

C

THE COURT'S FINDING THAT ITS PROCESS IS AVAILABLE TO THE BOARD TO PROTECT THE PUBLIC INTEREST CONFIRMS THAT THE INJUNCTION WAS IMPROVIDENTLY ISSUED.

The court was compelled to recognize that the Association could not escape all duty to comply with laws and regulations duly prescribed by the Board merely by placing itself, in effect, in the "custody" of the court. The court, however, insisted that during the pendency of the litigation (now in the fifth year), the Board may enforce its supervisory functions by invoking the process and powers of the court below.

The court found (Finding 35, R. 8256) :

> "That the process and powers of this Court are available to said Home Loan Bank Board to protect and preserve the public interest and rights involved in, or necessarily collateral to, this litigation, and to compel the performance of any alleged unfulfilled duty of said Association, or any other litigant herein, as well as to protect and preserve the assets and rights of the shareholder members and depositors and borrowers from, and other persons doing business with said Association."

Indeed, in its opinion holding that an injunction issue, the court below indicated that "this court having jurisdiction in this action would have the power upon the appropriate representations to appoint a receiver for the purpose of protecting the public interest or even for the purpose of protecting its own jurisdiction" (R. 11162).

The duty of providing for the operation and regulation of Federal savings and loan associations, however, has been vested by Congress in the Home Loan Bank Board. Section 5(d), Home Owners' Loan Act of 1933, as amended; *Fahey* v. *Mallonee,* 332 U.S. 445. It is readily apparent that the complex administrative accounting and financial problems and policies involved in carrying out the mandate of this statute are matters for the Executive Branch rather than the Judicial Branch of the Government. Such functions cannot be suspended because the Association has brought an action for damages in the court below, nor can that court by reason of the pendency of the action assume the functions of the Home Loan Bank Board.

D

THE ORDERING OF AN ADMINISTRATIVE INVESTIGATION AND HEARING ALONE DOES NOT CONSTITUTE IRREPARABLE INJURY.

The Court below has found that the mere conduct of the administrative investigation and hearing would result in irreparable damage to the Association, because of the burden of attendance at the hearing, because it would constitute a duplication of actions, and because, if after hear-

ing the Board required the Association to file reports and otherwise comply with regulations, the Association would thereby sacrifice interests in the litigation.

In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, the Supreme Court rejected the contention that the exhaustion of administrative remedies should not be required if the pleadings allege that the administrative hearings themselves would result in irreparable damage. In that case the plaintiff alleged that the National Labor Relations Board hearings would be futile and "the holding of them would result in irreparable damage to the Corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the Corporation and its employees, and thus seriously impair the efficiency of its operations" (*supra* at 47-48). The Court observed: "Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact" (*id.*, pp. 51-52). Nor is there any substance to the argument that mere holding of the hearing here would require the Association to sacrifice any position it has taken in the litigation. Obviously if, because of the pendency of the litigation or for any other reason, the Association is correct in refusing to comply with the basic regulations governing supervision to the extent of refusing even to submit periodic reports, the courts must assume that the administrative authorities will so find. *Fahey* v. *Mallonee*, 332 U. S. 245, 255. Moreover, the filing of the reports in question, reflecting the Association's book assets and liabilities, would in no wise constitute any admission, and certainly none which could not be avoided by a simple notation that all statements are contingent on the outcome of the pending litigation (R. 10951).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the preliminary injunction should be reversed and all

the complaints, cross-claims and ancillary proceedings in the consolidated actions should be dismissed.

Respectfully submitted,

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APPENDIX A

Federal Home Loan Bank Act as Amended

* * * * * * *

Sec. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established.

Sec. 4. (a) Any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, or savings bank, shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if such institution (1) is duly organized under the laws of any State or of the United States; (2) is subject to inspection and regulation under the banking laws, or under similar laws, of the State or of the United States; and (3) makes such home mortgage loans as, in the judgment of the board, are long-term loans (and in the case of a savings bank, if, in the judgment of the board, its time deposits, as defined in section 19 of the Federal Reserve Act, warrant its making such loans). No institution shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if, in the judgment of the board, its financial condition is such that advances may not safely be made to such institution or the character of its management or its home-financing policy is inconsistent with sound and economical home financing, or with the purposes of this Act.

(b) An institution eligible to become a member or a nonmember borrower under this section may become a member only of, or secure advances from, the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district, if demanded by convenience and then only with the approval of the board.

(c) Notwithstanding the provisions of clause (2) of subsection (a) of this section requiring inspection and regulation under law as a condition with respect to eligibility for membership, any building and loan association which would be eligible to become a member of a Federal Home Loan Bank except for the fact that it is not subject to inspection and regulation under the banking laws or similar laws of the State in which such association is organized shall, upon subjecting itself to such inspection and regulation as the board shall prescribe, be eligible to become a member.

SEC. 5. No institution shall be admitted to or retained in membership, or granted the privileges of nonmember borrowers, if the combined total of the amounts paid to it for interest, commission, bonus, discount, premium, and other similar charges, less a proper deduction for all dividends, refunds, and cash credits of all kinds, creates an actual net cost to the home owner in excess of the maximum legal rate of interest or, in case there is a lawful contract rate of interest applicable to such transactions, in excess of such rate (regardless of any exemption from usury laws), or, in case there is no legal rate of interest or lawful contract rate of interest applicable to such transactions, in excess of 8 per centum per annum in the State where such property is located. This section applies only to home mortgage loans made after the enactment of this Act.

SEC. 6. (a) As soon as practicable after the enactment of this Act, the board, with the approval of the Secretary of the Treasury, shall determine the minimum capital of each Federal Home Loan Bank which shall be not less than $5,000,000. The board shall, as soon as practicable thereafter, open books in each district established under section 3 for subscription to the capital stock of the Federal Home Loan Bank of the district.

(b) The capital stock of each Federal Home Loan Bank shall be divided into shares of a par value of $100 each. The minimum capital stock shall be issued at par. Stock issued thereafter shall be issued at such price not less than par as may be fixed by the board.

(c) The original stock subscription for each institution eligible to become a member under section 4 shall be an amount equal to 1 per centum of the aggregate of the unpaid principal of the subscriber's home mortgage loans, but not less than $500. The board shall from time to time adjust the amount of stock held by each member so that, as nearly as possible, such member shall at all times have invested in the stock of the Federal Home Loan Bank at least an amount calculated in the manner provided in the preceding sentence (but not less than $500). If the board finds that the investment of any member in stock is greater than that required under this section, upon application of such member, the bank shall pay such member for each share of stock in excess of the amount so required an amount equal to the value of such stock, or, at the election of the bank, the whole or any part of the payments which would be so made shall be credited upon the indebtedness of the member to the bank. In either such event, stock equal in value to the amount of the payment or credit, or both, as the case may be, shall be surrendered and canceled. No share of stock shall be surrendered and canceled if the effect of such surrender and cancellation would be to violate the provisions of section 10 (c) requiring the amount of stock held by such member to equal at least one-twelfth of the outstanding advances to such member.

(d) Stock subscriptions other than by the United States shall be paid for in cash, and shall be paid for at the time of application therefor, or, at the election of the subscriber, in installments, but not less than one-fourth of the total amount payable shall be paid at the time of filing application, and a further sum of not less than one-fourth of such total shall have been paid at the end of each succeeding period of four months.

(e) If the law of the State under which an institution described in section 4 operates does not permit such institution to subscribe for stock in the Federal Home Loan Bank but if such institution has the power to borrow money and give security therefor, the board may permit such institution to obtain advances on the same terms and conditions and subject to the same limitations as members (except that

such institution shall not be required, during the period during which advances may be made under this subsection, to subscribe for stock in the Federal Home Loan Bank or to deposit such stock as collateral security as required in section 10), but such institution shall be required to keep on deposit such security, in addition to home mortgages, for such advances, as the board shall determine, which shall equal in value 1 per centum of the aggregate unpaid principal of such institution's home mortgage loans (but not less than $500). No advance to any such institution shall be made under authority of this subsection after the State in which the institution is organized enacts legislation authorizing such institution to subscribe for Federal Home Loan Bank stock or after the expiration of the next regular session of the legislature of such State begun after the enactment of this Act, whichever is earlier. If, at the end of such time, such institution is not authorized to subscribe for stock, the bank shall proceed to liquidate the indebtedness of such institution to the bank and to terminate its relations with such institution. No advance shall be made under authority of this subsection which matures more than one year after the advance is made, but the bank may renew any such advance for yearly periods, or less, thereafter. The maturity of no advance authorized under this subsection shall be later than the time of the enactment of legislation authorizing such institution to become a member or the expiration of such session of the legislature of the State, whichever is earlier.

(f) The Secretary of the Treasury shall subscribe, on behalf of the United States, for such part of the minimum capital of each Federal Home Loan Bank as is not subscribed for by members under subsection (c) of this section within thirty days after books have been opened for stock subscriptions as provided in subsection (a). Payments for stock subscriptions by the Secretary of the Treasury shall be subject to call in whole or in part by the board, with the approval of the Secretary of the Treasury, at such time or times as may be deemed advisable. Each Federal Home Loan Bank receiving such payments shall issue receipts therefor to the Secretary of the Treasury, and such receipts shall be evidence of the stock ownership of the United States. The aggregate amount expended by the United States for the purchase of stock under this Act shall not exceed $125,000,000. The Reconstruction Finance Corporation Act, approved January 22, 1932, is amended by adding at the end of section 2 thereof the following new paragraph:

"In order to enable the Secretary of the Treasury to make payments upon stock of the Federal Home Loan Banks subscribed for by him in accordance with the Federal Home Loan Bank Act, the sum of $125,000,000, or so much thereof as may be necessary for such purpose, is hereby allocated and made available to the Secretary of the Treasury out of the capital of the corporation and/or the proceeds of notes, debentures, bonds, and other obligations issued by the corporation. For the purposes of this paragraph, the corporation shall issue such notes, bonds, debentures, and other obligations as may be necessary."

(g) After the amount of capital of a Federal Home Loan Bank paid in by members equals the amount paid in by the Secretary of the Treasury under subsection (f), such bank shall apply annually to the payment and retirement of the shares of the capital stock held by the United States, 50 per centum of all sums thereafter paid in as capital until all such capital stock held by the United States is retired at par. Stock held by the United States may at any time, in the discretion of the Federal Home Loan Bank, and with the approval of the board, be paid off at par and retired in whole or in part; and the board may at any time require such stock to be paid off at par and retired in whole or in part if in the opinion of the board the Federal Home Loan Bank has resources available therefor: *Provided,* That accumulated dividends, as provided in subsection (k), have been paid.

(h) Stock subscribed for otherwise than by the United States, and the right to the proceeds thereof, shall not be transferred or hypothecated except as hereinafter provided and the certificates therefor shall so state.

(i) Any member may withdraw from membership in a Federal Home Loan Bank six months after filing with the board written notice of intention so to do, and the board may, after hearing, remove any member from membership, or deprive any nonmember borrower of the privilege of obtaining further advances, if, in the opinion of the board, such member or nonmember borrower has failed to comply with any provision of this Act or the regulations of the board made pursuant thereto or if, in the opinion of the board, such member or nonmember borrower is insolvent. In any such case, the indebtedness of such member or nonmember borrower to the Federal Home Loan Bank shall be liquidated, and the capital stock in the Federal Home Loan Bank owned by such member shall be surrendered and canceled. Upon the liquidation of such indebtedness such

member or nonmember borrower shall be entitled to the return of its collateral, and, upon surrender and cancellation of such capital stock, the member shall receive a sum equal to its cash paid subscriptions for the capital stock surrendered, except that if at any time the board finds that the paid-in capital of a Federal Home Loan Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Federal Home Loan Bank shall on the order of the board withhold from the amount to be paid in retirement of the stock a pro rata share of the amount of such impairment as determined by the board.

(j) A Federal Home Loan Bank may, with the approval of the board, permit the disposal of stock to another member, or to an institution eligible to become a member, but only to enable such an institution to become a member.

(k) All stock of any Federal Home Loan Bank shall share in dividend distributions without preference.

SEC. 7. (a) The management of each Federal Home Loan Bank shall be vested in a board of twelve directors, all of whom shall be citizens of the United States and bona fide residents of the district in which such bank is located.

(b) Four of such directors shall be appointed by the Board and shall hold office for terms of four years; except that the terms of office of the two such directors heretofore appointed shall expire at the end of the calendar years 1936 and 1937, respectively, and the terms of office of the first two such directors hereafter appointed shall expire at the end of the calendar years 1938 and 1939, respectively.

(c) Six of such directors, two of whom shall be known as class A directors, two of whom shall be known as class B directors, and two of whom shall be known as class C directors, shall be elected as provided in subsection (e), and shall hold office for terms of two years; except that the terms of office of the directors heretofore elected or appointed shall expire at the end of the terms for which they were elected or appointed.

(d) Two of such directors shall be elected by the members of the Federal Home Loan Bank without regard to classes under rules and regulations to be prescribed by the Board, and shall hold office for terms of two years; except that the term of office of one of the directors first elected

under this subsection shall expire at the end of the calendar year 1936.

(e) The board shall divide all the members of each Federal Home Loan Bank into three groups which shall be designated as groups A, B, and C, which groups shall represent, respectively, and as fairly as may be, group A, the large, group B, the medium-sized, and group C, the small members, the size of such members to be determined according to the aggregate unpaid principal of the member's home mortgage loans. The board may revise the membership of such groups from time to time. Of the directors elected as hereinafter provided, each class A director shall be an officer or director of a member in group A, each class B director shall be an officer or director of a member in group B, and each class C director shall be an officer or director of a member in group C. Each member shall be entitled to nominate suitably qualified persons for election as directors of the class corresponding to the group to which such member belongs, and shall cast one vote for each director in its class. The directors of each class shall be nominated and elected in accordance with such rules and regulations as may be prescribed by the board.

(f) Any director appointed or elected as provided in this section to fill a vacancy shall hold office only until the expiration of the term of his predecessor.

(g) The board shall designate one of the directors of each bank to be chairman, and one to be vice chairman, of the board of directors of such bank.

(h) If at any time when nominations are required, members shall hold less than $1,000,000 of the capital stock of the Federal Home Loan Bank, the board shall appoint a director or directors to fill the place or places for which such nominations are required. A director so appointed shall serve until the expiration of the calendar year during which he takes office.

(i) Each bank may pay its directors reasonable compensation for the time required of them, and their necessary expenses, in the performance of their duties, in accordance with the resolutions adopted by such directors, subject to the approval of the board.

(j) Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember bor-

rower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations.

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SEC. 9. Any member or nonmember borrower of a Federal Home Loan Bank shall be entitled to apply in writing for advances. Such application shall be in such form as shall be required by the Federal Home Loan Bank with the approval of the board. Such Federal Home Loan Bank may at its discretion deny any such application, or, subject to the approval of the board, may grant it on such conditions as the Federal Home Loan Bank may prescribe.

SEC. 10. (a) Each Federal Home Loan Bank is authorized to make advances to its members, upon the security of home mortgages, or obligations of the United States, or obligations fully guaranteed by the United States, subject to such regulations, restrictions, and limitations as the Board may prescribe. Any such advance shall be subject to the following limitations as to amount:

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(c) Such advances shall be made upon the note or obligation of the member or nonmember borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine, and the Federal Home Loan Bank shall have a lien upon and shall hold the stock of such member as further collateral security for all indebtedness of the member to the Federal Home Loan Bank. At no time shall the aggregate outstanding advances made by any Federal Home Loan Bank to any member exceed twelve times the amounts paid in by such member for outstanding capital stock held by it, or made to a nonmember borrower exceed twelve times the value of the security required to be deposited under section 6 (e).

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SEC. 10b. Each Federal Home Loan Bank is authorized to make advances to nonmember mortgagees approved under

title II of the National Housing Act. Such mortgagees must be chartered institutions having succession and subject to the inspection and supervision of some governmental agency, and whose principal activity in the mortgage field must consist of lending their own funds. Such advances shall not be subject to the other provisions and restrictions of this Act, but shall be made upon the security of insured mortgages, insured under title II of the National Housing Act. Advances made under the terms of this section shall be at such rates of interest and upon such terms and conditions as shall be determined by the Federal Home Loan Bank Board, but no advance may be for an amount in excess of 90 per centum of the unpaid principal of the mortgage loan given as security.

SEC. 11. (a) Each Federal Home Loan Bank shall have power, subject to rules and regulations prescribed by the board to borrow and give security therefor and to pay interest thereon, to issue debentures, bonds, or other obligations upon such terms and conditions as the board may approve, and to do all things necessary for carrying out the provisions of this Act and all things incident thereto.

(b) The board may issue consolidated Federal Home Loan Bank debentures which shall be the joint and several obligations of all Federal Home Loan Banks organized and existing under this Act, in order to provide funds for any such bank or banks, and such debentures shall be issued upon such terms and conditions as the board may prescribe. No such debentures shall be issued at any time if any of the assets of any Federal Home Loan Bank are pledged to secure any debts or subject to any lien, and neither the board nor any Federal Home Loan Bank shall have power to pledge any of the assets of any Federal Home Loan Bank, or voluntarily to permit any lien to attach to the same while any of such debentures so issued are outstanding. The debentures issued under this section and outstanding shall at no time exceed five times the total paid-in capital of all the Federal Home Loan Banks as of the time of the issue of such debentures. It shall be the duty of the board not to issue debentures under this section in excess of the notes or obligations of member institutions held and secured under section 10 (a) of this Act by all the Federal Home Loan Banks.

(c) At any time that no debentures are outstanding under this Act, or in order to refund all outstanding consolidated

debentures issued under this section, the board may issue consolidated Federal Home Loan Bank bonds which shall be the joint and several obligations of all the Federal Home Loan Banks, and shall be secured and be issued upon such terms and conditions as the Board may prescribe.

(d) The board shall have full power to require any Federal Home Loan Bank to deposit additional collateral or to make substitutions of collateral or to adjust equities between the Federal Home Loan Banks.

(e) Each Federal Home Loan Bank shall have power to accept deposits made by members of such bank or by any other Federal Home Loan Bank or other instrumentality of the United States, upon such terms and conditions as the board may prescribe, but no Federal Home Loan Bank shall transact any banking or other business not authorized by this Act.

(f) The Board is authorized and empowered to permit, or whenever in the judgment of at least four members of the board an emergency exists requiring such action, to require, Federal Home Loan Banks, upon such terms and conditions as the board may prescribe, to rediscount the discounted notes of members held by other Federal Home Loan Banks, or to make loans to, or make deposits with, such other Federal Home Loan Banks, or to purchase any bonds or debentures issued under this section.

(g) Each Federal Home Loan Bank shall at all times have an amount equal to the sums paid in on outstanding capital subscriptions of its members, plus an amount equal to the current deposits received from its members, invested in (1) obligations of the United States, (2) deposits in banks or trust companies, (3) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers, upon such terms and conditions as the board may prescribe, and (4) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers whose creditor liabilities (not including advances from the Federal Home Loan Bank) do not exceed 5 per centum of their net assets, and which may be made without the security of home mortgages or other security, upon such terms and conditions as the board may prescribe.

(h) Such part of the assets of each Federal Home Loan Bank (except reserves and amounts provided for in subsection (g)) as are not required for advances to members or nonmember borrowers, may be invested, to such extent as

the bank may deem desirable and subject to such regulations, restrictions, and limitations as may be prescribed by the board, in obligations of the United States and in such securities as fiduciary and trust funds may be invested in under the laws of the State in which the Federal Home Loan Bank is located.

SEC. 12. The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain, and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this Act, as are customary and usual in corporations generally.

EXEMPTION FROM TAXATION

SEC. 13. Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Fed-

eral Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any home-owner debtor of such bank.

SEC. 14. When designated for that purpose by the Secretary of the Treasury, each Federal Home Loan Bank shall be a depositary of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as depositary of public money and financial agent of the Government as may be required of it.

SEC. 15. Obligations of the Federal Home Loan Banks issued with the approval of the board under this Act shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. The Federal reserve banks are authorized to act as depositaries, custodians, and/or fiscal agents for Federal Home Loan Banks in the general performance of their powers under this Act. All obligations of Federal Home Loan Banks shall plainly state that such obligations are not obligations of the United States and are not guaranteed by the United States.

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FEDERAL HOME LOAN BANK BOARD

SEC. 17. For the purposes of this Act there shall be a board, to be known as the "Federal Home Loan Bank Board", which shall consist of five citizens of the United

States appointed by the President of the United States, by and with the advice and consent of the Senate. Not more than three members of the board shall be members of the same political party. Each member shall devote his entire time to the business of the board. Before entering upon his duties each of the members shall take an oath faithfully to discharge the duties of his office. The President of the United States shall designate one of the members of the board to serve for a term of two years, one for three years, one for four years, one for five years, and one for six years from the date of the enactment hereof, and thereafter the term of each member shall be six years from the date of the expiration of the term for which his predecessor was appointed. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the board shall receive a salary at the rate of $10,000 per annum: *Provided,* That during the fiscal year 1933 the salary shall be $9,000 per annum. The President shall designate one of the members as chairman of the board. The chairman shall be the chief executive officer of the board and in his absence or disability the duties of his office shall be performed by some one of the other members to be designated as acting chairman by the chairman in such order as he may determine. The board shall supervise the Federal Home Loan Banks created by this Act, shall perform the other duties specifically prescribed by this Act, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this Act. The board shall have power to suspend or remove any director, officer, employee, or agent of any Federal Home Loan Bank, the cause of such suspension or removal to be communicated in writing forthwith to such director, officer, employee, or agent and to such Federal Home Loan Bank.

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SEC. 19. The board shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the performance of its duties under this Act without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, and agents

of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided in the case of members of the board. The board shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government; and shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid. The receipts of the Board derived from assessments upon the Federal Home Loan Banks and from other sources (except receipts from the sale of consolidated Federal Home Loan Bank bonds and debentures issued under section 11) shall be deposited in the Treasury of the United States, and may be from time to time withdrawn therefrom to defray the expenses of the Board and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this Act, specific amendments thereof, and rules and regulations of the Board not inconsistent therewith.

SEC. 20. The board shall from time to time, at least twice annually, require examinations and reports of condition of all Federal Home Loan Banks in such form as the board shall prescribe and shall furnish periodically statements based upon the reports of the banks to the board. The board shall annually make a full report of its operations to the Speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress. For the purposes of this Act, examiners appointed by the board shall be subject to the same requirements, responsibilities, and penalties as are applicable to examiners under the National Bank Act and the Federal Reserve Act, and shall have, in the exercise of functions under this Act, the same powers and privileges as are vested in such examiners by law.

SEC. 22. (a) In order to enable the board to carry out the provisions of this Act, the Treasury Department, the Comptroller of the Currency, the Federal Reserve Board, and the Federal reserve banks are hereby authorized, under such conditions as they may prescribe, to make available to the board in confidence for its use and the use of any Federal Home Loan Bank such reports, records, or other in-

formation as may be available, relating to the condition of institutions with respect to which any such Federal Home Loan Bank has had or contemplates having transactions under this Act or relating to persons whose obligations are offered to or held by any Federal Home Loan Bank, and to make through their examiners or other employees, for the confidential use of the board or any Federal Home Loan Bank, examinations of such institutions.

(b) Every institution which shall apply for advances under this Act shall, as a condition precedent thereto, consent to such examination as the bank or the board may require for the purposes of this Act and/or that reports of examinations by constituted authorities may be furnished by such authorities to the bank or the board upon request therefor.

SEC. 23. In order that the Federal Home Loan Banks may be supplied with such forms of stock, debentures, and bonds as may be necessary under this Act, the Secretary of the Treasury is authorized to prepare such forms thereof as shall be suitable and approved by the board, which shall be held in the Treasury subject to delivery, upon order of the board. The engraved plates, dies, and bed pieces executed in connection therewith shall remain in the custody of the Secretary of the Treasury. The board shall reimburse the Secretary of the Treasury for any expense incurred in the preparation, custody, and delivery of such stock, debentures, and bonds.

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SEC. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress.

SEC. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part.

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Home Owners' Loan Act of 1933 As Amended

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Sec. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

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(n) The Corporation is authorized to purchase Federal Home Loan Bank bonds, debentures, or notes, or consolidated Federal Home Loan Bank bonds or debentures. The Corporation is also authorized to purchase full-paid-income shares of Federal Savings and Loan Associations after the funds made available to the Secretary of the Treasury for the purchase of such shares have been exhausted. Such purchases of shares shall be on the same terms and conditions as have been heretofore authorized by law for the purchase of such shares by the Secretary of the Treasury: *Provided,* That the total amount of such shares in any one association held by the Secretary of the Treasury and the Corporation shall not exceed the total amount of such shares heretofore authorized to be held by the Secretary of the Treasury in any one association. The Corporation is also authorized to purchase shares in any institution which is (1) a member of a Federal Home Loan Bank, or (2) whose accounts are insured under title IV of the National Housing Act, if the institution is eligible for insurance under such title; and to make deposits and purchase certificates of deposit and investment certificates in any such institution. Of the total authorized bond issue of the Corporation $300,000,000 shall be available for the purposes of this subsection, without discrimination in favor of Federally chartered associations, and bonds of the Corporation not exceeding such amount may be sold for the purposes of this subsection.

Federal Savings and Loan Associations

Sec. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

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(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code with respect to

wages paid after December 31, 1939, for employment after such date), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

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(j) In addition to the authority to subscribe for preferred shares in Federal Savings and Loan Associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

(k) When designated for that purpose by the Secretary of the Treasury, any Federal Savings and Loan Association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal Savings and Loan Association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States.

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National Housing Act

Insurance of Savings and Loan Accounts

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Sec. 402. (a) There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of a board of trustees to be composed of five members and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this title. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.

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Sec. 403. (a) It shall be the duty of the Corporation to insure the accounts of all Federal savings and loan associations, and it may insure the accounts of building and loan, savings and loan, and homestead associations and cooperative banks organized and operated according to the laws of the State, District, or Territory in which they are chartered or organized.

(b) Application for such insurance shall be made immediately by each Federal savings and loan association, and

may be made at any time by other eligible institutions. Such applications shall be in such form as the Corporation shall prescribe, and shall contain an agreement (1) to pay the reasonable cost of such examinations as the Corporation shall deem necessary in connection with such insurance, and (2) if the insurance is granted, to permit and pay the cost of such examinations as in the judgment of the Corporation may from time to time be necessary for its protection and the protection of other insured institutions, to permit the Corporation to have access to any information or report with respect to any examination made by any public regulatory authority and to furnish any additional information with respect thereto as the Corporation may require, and to pay the premium charges for insurance as hereinafter provided. Each applicant for such insurance shall also file with its application an agreement that during the period that the insurance is in force it will not make any loans beyond fifty miles from its principal office except with the approval of, and pursuant to regulations of, the Corporation, but any applicant which, prior to the date of enactment of this Act, has been permitted to make loans beyond such fifty mile limit may continue to make loans within the territory in which the applicant is operating on such date; will not, after it becomes an insured institution, issue securities which guarantee a definite return or which have a definite maturity except with the specific approval of the Corporation, or issue any securities the form of which has not been approved by the Corporation; will not carry on any sales plan or practices, or any advertising, in violation of regulations to be made by the Corporation; will provide adequate reserves satisfactory to the Corporation, to be established in accordance with regulations made by the Corporation, before paying dividends to its insured members; but such regulations shall require the building up of reserves to 5 per centum of all insured accounts within a reasonable period, not exceeding twenty years, and shall prohibit the payment of dividends from such reserves, or the payment of any dividends if any losses are chargeable to such re-

serves: *Provided,* That for any year dividends may be declared and paid when losses are chargeable to such reserves if the declaration of such dividends in such case is approved by the Corporation.

(c) The Corporation shall reject the application of any applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe; and the Corporation may reject the application of any applicant if it finds that the character of the management of the applicant or its home financing policy is inconsistent with economical home financing or with the purposes of this title. Upon the approval of any application for insurance the Corporation shall notify the applicant, and upon the payment of the initial premium charge for such insurance, as provided in section 404, the Corporation shall issue to the applicant a certificate stating that it has become an insured institution. In considering applications for such insurance the Corporation shall give full consideration to all factors in connection with the financial condition of applicants and insured institutions, and shall have power to make such adjustments in their financial statements as the Corporation finds to be necessary.

(d) Any applicant which applies for insurance under this title after the first year of the operation of the Corporation shall pay an admission fee based upon the reserve fund of the Corporation, which, in the judgment of the Corporation, is an equitable contribution.

SEC. 404. (a) Each institution whose application for insurance is approved by the Corporation shall pay to the Corporation, in such manner as it shall prescribe, a premium charge for such insurance equal to one-twelfth of 1 per centum of the total amount of all accounts of the insured members of such institution plus any creditor obligations of such institution. Such premium shall be paid at the time the certificate is issued by the Corporation under section 403, and thereafter annually until a reserve fund has been estab-

lished by the Corporation equal to 5 per centum of all insured accounts and creditor obligations of all insured institutions; except that under regulations prescribed by the Corporation such premium charge may be paid semiannually. If at any time such reserve fund falls below such 5 per centum, the payment of such annual premium charge for insurance shall be resumed and shall be continued until the reserve is brought back to such 5 per centum. For the purposes of this subsection, the amount in all accounts of insured members and the amount of creditor obligations of any institution may be determined from adjusted statements made within one year prior to the approval of the application of such institution for insurance, or in such other manner as the Corporation may by rules and regulations prescribe.

(b) The Corporation is further authorized to assess against each insured institution additional premiums for insurance until the amount of such premiums equals the amount of all losses and expenses of the Corporation; except that the total amount so assessed in any one year against any such institution shall not exceed one-eighth of 1 per centum of the total amount of the accounts of its insured members and its creditor obligations.

(c) Each insured institution which has paid a premium charge in excess of one-eighth of 1 per centum of the total amount of the accounts of its insured members and its creditor obligations shall be credited on its future premiums with an amount equal to the total amount of such excess.

Payment of Insurance

Sec. 405. (a) Each institution whose application for insurance under this title is approved by the Corporation shall be entitled to insurance up to the full withdrawable or repurchasable value of the accounts of each of its members and investors (including individuals, partnerships, associations, and corporations) holding withdrawable or repurchasable shares, investment certificates, or deposits, in such institution; except that no member or investor of any such institution shall be insured for an aggregate amount in excess of $10,000.

(b) In the event of a default by any insured institution,

payment of each insured account in such insured institution which is surrendered and transferred to the Corporation shall be made by the Corporation as soon as possible either (1) by cash or (2) by making available to each insured member a transferred account in a new insured institution in the same community or in another insured institution in an amount equal to the insured account of such insured member: *Provided,* That the Corporation, in its discretion, may require proof of claims to be filed before paying the insured accounts, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured account, it may require the final determination of a court of competent jurisdiction before paying such claim.

SEC. 406. (a) In order to facilitate the liquidation of insured institutions, the Corporation is authorized (1) to contract with any insured institution with respect to the making available of insured accounts to the insured members of any insured institution in default, or (2) to provide for the organization of a new Federal savings and loan association for such purpose subject to the approval of the Federal Home Loan Bank Board.

(b) In the event that a Federal savings and loan association is in default, the Corporation shall be appointed as conservator or receiver and is authorized as such (1) to take over the assets of and operate such association, (2) to take such action as may be necessary to put it in a sound and solvent condition, (3) to merge it with another insured institution, (4) to organize a new Federal savings and loan association to take over its assets, or (5) to proceed to liquidate its assets in an orderly manner, whichever shall appear to be to the best interests of the insured members of the association in default; and in any event the Corporation shall pay the insurance as provided in section 405 and all valid credit obligations of such association. The surrender and transfer to the Corporation of an insured account in any such association which is in default shall subrogate the Corporation with respect to such insured account, but shall not affect any right which the insured member may have in the uninsured portion of his account or any right which he may have to participate in the distribution of the net proceeds remaining from the disposition of the assets of such association.

(c) In the event any insured institution other than a Federal savings and loan association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are hereby tendered to the court or other public authority having the power of appointment. If the Corporation is so appointed, it shall have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) with respect to Federal savings and loan associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 405, and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.

(d) In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

(e) The Corporation shall make an annual report to the Congress of the operation by it of insured institutions in default, and shall keep a complete record of the administration by it of the assets of such insured institutions which shall be subject to inspection by any officer of any such insured institution or by any other interested party, and, if any such insured institution is operated under the laws of any State, Territory, or possession of the United States, or of the District of Columbia, such annual report shall also be filed with the public authority which has jurisdiction over the insured institution.

(f) In order to prevent a default in an insured institution or in order to restore an insured institution in default to normal operation as an insured institution, the Corporation is authorized, in its discretion, to make loans to, pur-

chase the assets of, or make a contribution to, an insured institution or an insured institution in default; but no contribution shall be made to any such institution in an amount in excess of that which the Corporation finds to be reasonably necessary to save the expense of liquidating such institution.

"SEC. 407. Any insured institution other than a Federal savings and loan association may terminate its status as an insured institution by written notice to the Corporation, and the Corporation, for violation by an insured institution of its duty as such may, after written notice of any such alleged violation of duty and after reasonable opportunity to be heard, by written notice to such insured institution, terminate such status. In the event of the termination of such status, insurance of its accounts to the extent that they were insured on the date of such notice, less any amounts thereafter withdrawn, repurchased, or redeemed which reduce the insured accounts of an insured member below the amount insured on the date of such notice, shall continue for a period of two years, but no investments or deposits made after the date of the notice of termination shall be insured. The Corporation shall have the right to examine such institution from time to time during the two-year period aforesaid. Such insured institution shall be obligated to pay, within thirty days after any such notice of termination, as a final insurance premium, a sum equivalent to twice the last annual insurance premium paid by it. In the event of the termination of insurance of accounts as herein provided the institution which was the insured institution shall give prompt and reasonable notice to all of its insured members that it has ceased to be an insured institution and it may include in such notice the fact that insured accounts, to the extent not withdrawn, repurchased, or redeemed, remain insured for two years from the date of such termination, but it shall not further represent itself in any manner as an insured institution. In the event of failure to give notice to insured members as herein provided the Corporation is authorized to give reasonable notice."

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Executive Order No. 9070

Feb. 24, 1942, 7 F. R. 1529

Consolidation of Housing Agencies and Functions

National Housing Agency

By virtue of the authority vested in me by Title I of the First War Powers Act, 1941, approved December 18, 1941 (Public Law 354, 77th Congress), and as President of the United States, it is hereby ordered as follows:

1. The following agencies, functions, duties, and powers are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator:

(a) The Federal Housing Administration and its functions, powers, and duties, including those of the Administrator thereof.

(b) All functions, powers, and duties of the Federal Home Loan Bank Board and of its members.

(c) The Home Owners Loan Corporation and the functions, powers, and duties of its Board of Directors.

(d) The Federal Savings and Loan Insurance Corporation and the functions, powers, and duties of its Board of Trustees.

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2. The National Housing Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of $12,000 a year unless the Congress shall otherwise provide. Pending such appointment, an existing officer of the Government designated by the President shall act as National Housing Administrator.

3. There shall be three main constituent units in the National Housing Agency. Each such unit shall be administered by a commissioner acting under the direction and supervision of the National Housing Administrator. The unit administering the Federal Housing Administration and its functions, powers, and duties shall be known as the Federal Housing Administration, and the Federal Housing Administrator shall serve as Federal Housing Commissioner. The unit administering the functions, powers, and duties of the Federal Home Loan Bank Board and its members shall be known as the Federal Home Loan Bank Administration, and the Chairman of the Federal Home Loan Bank Board shall serve as Federal Home Loan Bank Commissioner. The United States Housing Authority and its functions, powers, and duties shall be administered as the Federal Public Housing Authority, one of the main constituent units, and the Administrator of the United States Housing Authority shall serve as Federal Public Housing Commissioner. The agencies, functions, powers, and duties enumerated in sub-paragraphs (c), (d), and (k) of paragraph 1 shall be administered in the Federal Home Loan Bank Administration, and those enumerated in sub-paragraphs (f) and (g) shall be administered in the Federal Public Housing Authority. The agency, functions, powers, and duties enumerated in sub-paragraph (h) of paragraph 1 shall also be administered by the Federal Public Housing Commissioner. The Administrator of the National Housing Agency may centralize in the office of the National Housing Administrator such budget, personnel, legal, procurement, research, planning, or other administrative services or functions common to the said constituent units as he may determine.

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6. All assets, contracts, and property (including office equipment and records) of any agency hereby consolidated, and all assets, contracts, and property (including office equipment and records) which other agencies, including departments, have been using primarily in the administration of any function, power, or duty hereby consolidated or transferred, are hereby transferred, respectively, with such agency, function, power or duty.

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13. Nothing herein shall impair or affect any outstanding obligations or contracts of any agency consolidated hereunder or of the United States of America (including its pledge of faith to the payment of all annual contributions now or hereafter contracted for pursuant to the United States Housing Act, as amended) [sections 1401-1406, 1407-1430 of Title 42], or of any Insurance Funds created under the National Housing Act [section 371 *et seq.* of Title 12].

14. All orders, rules, regulations, permits, or other privileges made, issued or granted by or in respect of any agency, function, power, or duty consolidated hereunder shall continue in effect to the same extent as if such consolidation had not occurred until modified, superseded, or repealed, except that the regulations of January 11, 1941, relating to defense housing coordination shall hereby be revoked upon the appointment or designation of the National Housing Administrator.

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17. This order shall become effective as of the date hereof and shall be in force and effect so long as Title I of the First War Powers Act, 1941 remains in force.

Reorganization Plan No. 3 of 1947

Effective July 27, 1947, 12 F. R. 4981

Housing and Home Finance Agency

Section 1. *Housing and Home Finance Agency.*—The Home Owners' Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, the United States Housing Authority, the Defense Homes Corporation, and the United States Housing Corporation, together with their respective functions, the functions of the Federal Home Loan Bank Board, and the other functions transferred by this Plan, are consolidated, subject to the provisions of sections 2 to 5, inclusive, hereof, into an agency which shall be known as the Housing and Home Finance Agency. There shall be in said Agency constituent agencies which shall be known as the Home

Loan Bank Board, the Federal Housing Administration, and the Public Housing Administration.

SECTION 2. *Home Loan Bank Board.*—(a) The Home Loan Bank Board shall consist of three members appointed by the President by and with the advice and consent of the Senate. Not more than two members of the Board shall be members of the same political party. The President shall designate the members of the Board first appointed hereunder to serve for terms expiring, respectively, at the close of business on June 30, 1949, June 30, 1950, and June 30, 1951, and thereafter the term of each member shall be four years. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the Board shall receive compensation at the rate of $10,000 per annum.

(b) The President shall designate one of the members of the Home Loan Bank Board as Chairman of the Board. The Chairman shall (1) be the chief executive officer of the Board, (2) appoint and direct the personnel necessary for the performance of the functions of the Board or of the Chairman or of any agency under the Board, and (3) designate the order in which the other members of the Board shall, during the absence or disability of the Chairman, be Acting Chairman and perform the duties of the Chairman.

(c) Except as otherwise provided in subsection (b) of this section there are transferred to the Home Loan Bank Board the functions (1) of the Federal Home Loan Bank Board, (2) of the Board of Directors of the Home Owners' Loan Corporation, (3) of the Board of Trustees of the Federal Savings and Loan Insurance Corporation, (4) of any member or members of any of said Boards, and (5) with respect to the dissolution of the United States Housing Corporation.

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SECTION 7. *Interim appointments.*—Pending the initial appointment hereunder of any officer provided for by this Plan, the functions of such officer shall be performed temporarily by such officer of the existing National Housing Agency as the President shall designate.

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SECTION 9. *Abolitions.*—The Federal Home Loan Bank Board, the Board of Directors of the Home Owners' Loan Corporation, and the Board of Trustees of the Federal Savings and Loan Insurance Corporation, together with the offices of the members of said boards, the office of Federal Housing Administrator, and the office of Administrator of the United States Housing Authority, are abolished.

APPENDIX B

RULES AND REGULATIONS

(Effective Prior to August 15, 1949; by Reorganization Plan No. 3 of 1947, the Federal Home Loan Bank Administration, Referred to in these regulations, was succeeded by the Home Loan Bank Board)

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202.9 Charter and bylaws—(a) Issuance of charter K.—If the petition for charter is approved, the following charter (hereinafter referred to as a "Charter K") shall be issued:

CHARTER K

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4. Members.—All holders of share accounts of the association and all borrowers therefrom shall be deemed and held to be members thereof. In the consideration of all questions requiring action by the members, each holder of a share account shall be permitted to cast one vote for each $100, or fraction thereof, of the participation value of his share account. A borrowing member shall be permitted, as a borrower, to cast one vote, and to cast the number of votes to which he may be entitled as the holder of a share account. No member, however, shall cast more than 50 votes. Voting may be by proxy. Any number of members present at a regular or special meeting of the members shall constitute a quorum. A majority of all votes cast at any meeting of members shall determine any question. The members who shall be entitled to vote at any meeting of the members shall be those owning share accounts and borrowing members of record on the books of the association at the end of the calendar month next preceding the date of the meeting of members.

5. Directors and officers.—The association shall be under the direction of a board of directors of not less than 5 nor more than 15, as determined and elected by the members. Directors shall be elected by ballot from the membership of the association, and a director shall

cease to be a director when he ceases to be a member. At the first meeting of members of the association, directors shall be elected to serve until the first annual meeting and until their successors are duly elected and qualified. Thereafter directors shall be elected for periods of 3 years and until their successors are elected and qualified, but provision shall be made for the election of approximately one-third of the board of directors each year. In the event of a vacancy, including vacancies created by an increase by vote of the members of the number of directors within the limits hereinabove specified, the board of directors may fill the vacancy, if the members fail so to do, by electing a director to serve until the next annual meeting of the members, at which time a director shall be elected to fill the vacancy for the unexpired term. At its meeting, which shall be held as soon as practicable after the annual meeting of members, the board of directors shall elect a president, one or more vice presidents, a secretary, and a treasurer. It may appoint such additional officers and employees as it may from time to time determine. The offices of secretary and treasurer may be held by the same person, and a vice president may also be either the secretary or the treasurer. The term of office of all officers shall be one year or until their respective successors are elected and qualified; but any officer may be removed at any time by the board of directors. In the absence of designation from time to time of powers and duties by the board of directors, the officers shall have such powers and duties as generally pertain to the respective offices.

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203.2. Other examinations, audits, and supervision.—For the protection of its members and the public, each Federal association shall be examined (with appraisals when deemed advisable) at least annually by the examining division of the Board. The cost, as determined by the Board, of such examination, including office analysis thereof, audit, and any appraisals made in connection therewith and of other supervision by the Board shall be paid by the Federal association. If a Federal association is not audited at least once each year in a manner and by auditors satisfactory to the Board, the examination of such Federal association shall include an audit. Two copies of any audit of a Federal association, signed and certified by the auditor making such audit, shall promptly be filed with the Board through the Federal home loan bank of which the Federal associa-

tion is a member. To assist in proper maintenance of records for supervision and regulation, communications from Federal associations shall normally be forwarded to the Board in duplicate through the Federal home loan bank of which the Federal association is a member. (Sec. 5 (a) of H. O. L. A. of 1933, 48 Stat. 132; 12 U. S. C. 1464 (a).)

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203.5. Forms and reports.—Every Federal association shall use such forms and follow such accounting practices as may, from time to time, be prescribed by the Board. Every Federal association shall close its books on June 30, and December 31, of each year and shall make an annual report of its affairs as of December 31 of each year. Within thirty days after December 31 of each year two copies shall be forwarded to the Federal home loan bank of which the association is a member, one copy of which shall thereupon be transmitted by the bank to the Governor of the Federal Home Loan Bank System. The officers of each association shall make a monthly report to the association's board of directors on forms prescribed by the Board which shall be filed as follows: One copy shall be forwarded to the Federal home loan bank of which the association is a member and two copies to the Governor of the Federal Home Loan Bank System, Washington, D. C. Within the month of January of each year, a copy of a statement of condition of each Federal association, as of December 31, immediately preceding, in form prescribed by the Board shall either be mailed to each of the association's members at his last address appearing on the association's books, or published in a newspaper printed in the English language and of general circulation in the county in which the association's home office is located; provided, however, that said statement may be in greater detail and may omit such items as are inapplicable. Within 5 days after the statement has been so mailed or published a statement signed by an executive officer of the association, certifying that the statement has been so mailed or published, together with a copy of the statement of condition, shall be transmitted to the Governor of the Federal Home Loan Bank System, Washington, D. C., and to the President of the Federal Home Loan Bank of which the association is a member. (Sec. 5 (a) of H. O. L. A. of 1933, 48 Stat. 132; 12 U. S. C. 1464 (a).)

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203.7. Investments by Home Owners' Loan Corporation.—Whenever a Federal association needs funds for the

financing of homes, it may request Home Owners' Loan Corporation to purchase an investment share account, consisting of full-paid income shares, as provided in section 4 (n) of Home Owners Loan Act of 1933, as amended, and in investment procedure approved by the Board. (Sec. 5 (a) of H. O. L. A. of 1933, 48 Stat. 132, sec. 4 (n) H. O. L. A. of 1933 as added by sec. 17 (a), 49 Stat. 297; 12 U. S. C. 1464 (a), 12 U. S. C. Sup., 1463 (n).)

203.8. Investment and redemption procedure for Home Owners' Loan Corporation and Secretary of the Treasury —(a) Maximum investment in one association by the Home Owners' Loan Corporation.—No requests for such investment by Home Owners' Loan Corporation will be approved by the Board in excess of three times the amount paid on unpledged share accounts standing to the bona fide credit of private investors. In determining the upper limit of investment by Home Owners' Loan Corporation in any Federal association, the Board will multiply the amount of unpledged share accounts standing to the credit of private investors by three, and substract therefrom the amount of any subscription for preferred shares and full-paid income shares by the Secretary of the Treasury plus the amount of any investment, or request for investment, by Home Owners' Loan Corporation.

(b) Forms for investments by Home Owners' Loan Corporation.—Forms for certification of financial statement, resolution authorizing procedure for investment, and application forms for use by Federal associations in requesting investment by Home Owners' Loan Corporation may be procured from the Federal home loan bank of which the Federal association is a member.

(c) Repurchase fee.—No repurchase fee may be charged upon the repurchase of any investment by the Secretary of the Treasury or by Home Owners' Loan Corporation.

(d) Retirement of investments by the Secretary of the Treasury or Home Owners' Loan Corporation.—Retirement of investments by the Secretary of the Treasury or by Home Owners' Loan Corporation in Federal associations may be effected in accordance with procedure and using forms approved by the Board, which procedure and forms may be obtained from the Federal home loan bank of which the Federal association is a member. No request for the privilege of retiring investments by the Secretary of the Treasury will be approved by the Board unless such request

is received by the Board at its office in Washington, D. C. within 30 days subsequent to the last preceding dividend date, accompanied by a check, postal money order, or bank draft in the amount of the investment sought to be retired, together with any dividends declared but unpaid, on such investment to the last preceding dividend date. Any Federal association may request from time to time the voluntary repurchase of investments by the Secretary of the Treasury and by Home Owners' Loan Corporation in the same order as applications for repurchase of such investments may be made by the Secretary of the Treasury and Home Owners' Loan Corporation under subsection (j) of section 5 and subsection (n) of section 4 of Home Owners Loan Act of 1933, as amended. All such voluntary repurchases will be deducted from the next succeeding requests for repurchase which the Secretary of the Treasury or Home Owners' Loan Corporation is permitted by law to make.

(e) Retirement of investments upon request by the Secretary of the Treasury or the Home Owners' Loan Corporation.—The basis for computing the amount of repurchases which the Secretary of the Treasury or the Home Owners' Loan Corporation may at any time request shall be the original amount of separate investments made five years or more prior to the date of each such request, and the original amount of each such separate investment shall be included in the said basis until such time as the investment would have been fully retired had separate requests been made for the retirement of the investment and had the repurchases been applied accordingly. Repurchases shall be applied toward the retirement of the investment first made by the Secretary of the Treasury or the Home Owners' Loan Corporation and not previously retired.

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203.18. Fiscal agency powers and duties.—When designated for that purpose by the Secretary of the Treasury, a Federal association shall perform all such reasonable duties as fiscal agent of the Government specified by the Secretary of the Treasury. Such a Federal association shall exercise only such powers and privileges as a fiscal agent of the Government as are enumerated in regulations prescribed by the Secretary of the Treasury. When the designation for that purpose by any other instrumentality

of the United States has been approved by the Board, a Federal association upon qualification for such employment shall perform the duties as agent of such instrumentality specified by such instrumentality of the United States. Such a Federal association shall exercise only such powers and privileges as an agent of any other instrumentality of the United States as are prescribed by such other instrumentality of the United States. (Sec. 5 (a) of H. O. L. A. of 1933, 48 Stat. 132, sec. 5 (k) of H. O. L. A. of 1933 as added by sec. 5, 48 Stat. 646; 12 U. S. C. 1464 (a), (k).)

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206.1. Receiver or conservator, appointment.—Whenever, in the opinion of the Federal Home Loan Bank Administration, any Federal savings and loan association:

(1) is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) cannot with safety continue in business;

(4) is impaired in that its assets do not have an aggregate value (in the judgment of the Federal Home Loan Bank Administration) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) is in imminent danger of becoming impaired;

(6) is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) has suspended payment of its obligations;

(8) has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Administration;

(9) has refused by the refusal of any of its officers, directors, or employees to be examined upon oath by the Federal Home Loan Bank Administration or its representative concerning its affairs; or

(10) has refused or failed to observe a lawful order of the Federal Home Loan Bank Administration, the Federal Home Loan Bank Administration may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Federal Home Loan Bank Administration may appoint a conservator for such Fed-

eral association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of the Federal Home Loan Bank System, or any deputy or Assistant Governor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration. The Secretary of the Federal Home Loan Bank Administration shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the address of the association as it shall appear on the records of the Federal Home Loan Bank Administration and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Federal Home Loan Bank Administration. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

206.2. Hearing on appointment.—Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand

therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the Federal Home Loan Bank Administration for the purposes of this Section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

206.3. Costs of hearings.—Costs, as determined by the Federal Home Loan Bank Administration, of hearings held pursuant to section 206.2 may be assessed against the association demanding the same upon the order of the Federal Home Loan Bank Administration unless the Federal Home Loan Bank Administration finds upon such hearing that there is no cause for the appointment of a conservator or receiver. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

206.4. Discharge of conservator or receiver.—An order of the Federal Home Loan Bank Administration discharging a conservator and returning the association to its management shall restore to such Federal association all its rights, powers and privileges and shall restore the rights, powers, and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. An order of the Federal Home Loan Bank Administration discharging a receiver and returning

the association to its management shall by operation of law and without any conveyance or other instrument, act or deed, restore to such Federal association all its rights, powers and privileges, revest in such Federal association the title to all its property, and restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

206.5. Effect of amendments to regulations.—Amendments to these rules and regulations shall not affect the validity of any appointment heretofore made by the Board, or the conduct of any receivership or conservatorship existing at the time of such amendment, or the procedure to be followed under any such appointment, unless the amendment expressly so states, except that, to the extent not otherwise specified in any statute, rule, regulation, order or plan governing such appointment and actions thereunder, the titles, rights, powers, privileges, and immunities specified in these rules and regulations, as from time to time amended, shall be deemed interpretative of the statutes, rules, regulations, orders, and plans governing such appointments and actions thereunder. Any temporary conservator in possession of any Federal savings and loan association shall continue as such temporary conservator pursuant to the order of appointment and rules and regulations in effect at the time of such appointment, and shall be succeeded by a receiver or conservator or the affairs of the association shall be otherwise disposed of as provided in such order and rules and regulations: *Provided, however,* That any receiver or conservator who shall replace or succeed such temporary conservator, except another temporary conservator, shall, upon appointment, have and possess all the rights, powers, privileges, and immunities, and shall be subject to the duties and liabilities vested and imposed on a receiver or conservator by these rules and regulations as amended, but the causes for the appointment of a receiver or conservator in place of such temporary conservator shall be those specified by the rules and regulations in effect at the time of the appointment of such temporary conservator. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

Part 207—Powers of Conservator and Conduct of Conservatorships

207.1. Take possession, when.—Upon appointment, the conservator for a Federal association shall forthwith take possession of the books, records, and assets of every description of such association. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.2. Procedure upon taking possession.—Upon taking possession, pursuant to section 207.1 of these rules and regulations, of such Federal association, the conservator shall forthwith:

(a) Notify, by written notice served personally or by registered mail or telegraph, all banks, trust companies and all other individuals, partnerships, corporations, and associations known to such conservator to be holding or in possession of any assets of such association.

(b) File with the Secretary of the Federal Home Loan Bank Administration a statement (1) that he has taken possession, pursuant to section 207.1 of these rules and regulations, of such Federal association and (2) of the time of such taking of possession; and such statement shall be conclusive evidence of such taking of possession and of the time of such taking of possession, and

(c) If the ground, or one of the grounds, of his appointment is the ground set forth in subdivision numbered (4) of section 206.1 of these rules and regulations, post a notice in substantially the following form on the door of the home office of such association:

.....Federal Savings and Loan Association.....
....., ..., is in the possession and charge of the undersigned as Conservator under appointment by the Federal Home Loan Bank Administration.

....
(Date) (Conservator)

(Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.3. Succession.—Immediately upon taking possession, pursuant to section 207.1 of these rules and regulations, of such Federal association, the conservator shall succeed to all the rights, powers, and privileges of the Federal association, its officers and directors, or any of them. Such officers and directors, or any of them, shall not thereafter have, exercise, or act in connection with, any such rights, powers or privileges, or any asset or property of any nature of the association; *Provided, however,* That nothing herein shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they may have to the Federal Home Loan Bank Administration or its representatives designated to receive such petitions concerning such association, or to represent the association at hearings provided for in these rules and regulations. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.4. Disposition.—The Federal Home Loan Bank Administration may, at any time, order the association returned to its management and may, before returning the association to its management regardless of whether such association is subsequently returned to its management, order a meeting of the shareholders for any purpose, including, without any limitation on the generality of the foregoing, election of new directors, or of the board of directors for any purpose, including, without any limitation on the generality of the foregoing, the filling of vacancies on the board of directors or the election of new officers, or may order meetings of both members and directors.

Each such election shall be supervised by a representative of the Federal Home Loan Bank Administration. The Federal Home Loan Bank Administration may at any time, without further hearing as provided in section 206.2 of these rules and regulations, replace the conservator by appointing the Federal Savings and Loan Insurance Corporation as receiver for the purpose of liquidation. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.5. Powers and duties of conservator.—The conservator, subject to the direction and supervision of the Governor of the Federal Home Loan Bank System, shall, after taking possession pursuant to section 207.1 of these rules and regulations, take such action as may be necessary to conserve the assets of the association pending further disposition of its affairs. The conservator shall forthwith in his name, in the name of the association, in the name of both, or otherwise, collect all obligations and money due the association, and in his name, in the name of the association, in the name of both, or otherwise.

(a) May do all things desirable or expedient in his discretion to carry on the business of the association to an extent consistent with his appointment and to preserve and conserve the assets and property of every nature of such association;

(b) May exercise all the rights and powers of such association, including, without any limitation on the generality of the foregoing, any rights and powers under any mortgage, deed of trust, chose in action, option, collateral note, contract, judgment or decree, share or certificate of share of stock, or instrument of any nature;

(c) May, with the approval of the Federal Home Loan Bank Administration or of said Governor, pay off and discharge any taxes, assessments, liens, claims, or charges of any nature against the association or the conservator or any asset or property of any nature of such association;

(d) May pay out and expend such sums as he shall deem necessary or advisable

(1) For or in connection with the preservation, maintenance, conservation, or protection, or

(2) With the approval of the Federal Home Loan Bank Administration or of said Governor for or in connection with the remodeling, repair, rehabilitation, or improvement

not necessary for such preservation, maintenance, conservation, or protection
of any asset or property of such association;

(e) May, with the approval of the Federal Home Loan Bank Administration or of said Governor,

(1) Pay out and expend such sums as he shall deem necessary or advisable for or in connection with the preservation, maintenance, conservation, or protection of, or

(2) Pay off and discharge any taxes, assessments, liens, claims, or charges of any nature against

any asset or property of any nature on which the association or conservator has a lien by way of mortgage, deed of trust, pledge or otherwise, or in which the association or conservator has an interest of value of any nature;

(f) May, under the direction and supervision of the General Counsel of the Federal Home Loan Bank Administration, institute, prosecute, maintain, defend, intervene, and otherwise participate in any and all actions, suits, or other legal proceedings by and against the conservator or association or in which the conservator, the association, or its creditors or members, or any of them, shall have an interest, and in every way to represent such association, its members and creditors;

(g) (1) May, with the approval of said Governor, employ such assistants and employees as he may deem necessary for the proper administration of the conservatorship, and shall by bond cover all such assistants and employees in form satisfactory to such conservator and to the said Governor, the cost of the same and the cost of the conservator's bond to be paid out of the assets of the association in the possession of the conservator; and (2) shall employ any attorney or attorneys designated by the General Counsel of the Federal Home Loan Bank Administration, in connection with litigation or otherwise to give legal advice and assistance, for the conservatorship generally or in particular instances, and pay retainers and compensation of such attorney or attorneys, together with all expenses, including, but not limited to, the costs and expenses of any litigation, as approved by said General Counsel, out of the assets of the association;

(h) May execute, acknowledge, and deliver any and all deeds, contracts, leases, assignments, bills of sale, releases, extensions, satisfactions, and other instruments necessary

or proper for any purposes, including, without any limitation on the generality of the foregoing, the effectuation or termination of any sale, lease, or transfer of real, personal, or mixed property. Any deed or other instrument executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as if the same had been executed, as the act and deed of the association or otherwise, by the officers of such association by authority of its board of directors;

(i) Shall immediately transfer the depository bank balances of the association to account "R" hereinafter provided for, or to the account with the Federal Home Loan Bank, of which the association is a member, hereinafter provided for, and, unless otherwise directed by the Federal Home Loan Bank Administration or said Governor, shall open two accounts in banks insured by the Federal Deposit Insurance Corporation, as follows:

(1) One of these accounts shall be known as account "R" and the other shall be known as account "D."

(2) All funds of the association coming into the possession of the conservator shall be forthwith deposited in account "R."

(3) Disbursements shall be made from account "R" only by transfer to an account with the Federal Home Loan Bank of which the association is a member, which transfer may be made by the conservator.

(4) Deposits shall be made in account "D" only by order of or with the approval of the Federal Home Loan Bank Administration or the Governor.

(5) The conservator may make disbursements in connection with his duties as conservator from account "D."

(6) All depository bank accounts of the conservator shall be carried as follows:

....., Conservator
(Name of conservator)

for .....
(Name of association)

(j) (1) May, with the approval of the Federal Home Loan Bank Administration or said Governor, sell for cash any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, or share or certificate of share

of stock or debt, owing to such association, at not less than the actual amount owing the association thereon or the face or par value thereof, and

(2) May, with the approval of the Federal Home Loan Bank Administration, or on terms and conditions approved by the Federal Home Loan Bank Administration, sell for cash or on terms, or exchange or otherwise dispose of, at less than the amount owing the association thereon or the face or par value thereof, in whole or in part, any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, share or certificate of share of stock or debt, owing to such association;

(k) (1) May lease on a month to month basis, or for a term of not to exceed 1 year, and

(2) May, with the approval of the Federal Home Loan Bank Administration, or on terms and conditions approved by the Federal Home Loan Bank Administration, sell for cash or on terms, lease for a period of more than 1 year, exchange or otherwise dispose of, in whole or in part,

any or all of the assets and property of the association, real, personal, and mixed, tangible and intangible, of any nature;

(l) May, with the approval of the Federal Home Loan Bank Administration or of said Governor, or on terms and conditions approved by the Federal Home Loan Bank Administration or said Governor, surrender, abandon, and release any choses in action, or other assets or property of any nature, whether the subject of pending litigation or not, and reject or repudiate any lease or contract which he considers burdensome;

(m) May, with the approval of the Federal Home Loan Bank Administration, or on terms and conditions approved by the Federal Home Loan Bank Administration, settle, compromise, or obtain the release of, for cash or other considerations, claims and demands against such association or the conservator;

(n) May, with the approval of the Federal Home Loan Bank Administration, or on terms and conditions approved by the Federal Home Loan Bank Administration, settle, compromise, or release, for cash or other considerations, claims, and demands in favor of the association or the conservator;

(o) May, with the approval of the Federal Home Loan Bank Administration, and on terms and conditions approved by the Federal Home Loan Bank Administration, borrow money in any amount and from any source and in any manner, and execute, acknowledge, and deliver notes, certificates, and other evidence of indebtedness therefore and secure the repayment thereof by the mortgage, pledge, assignment in trust, or hypothecation of any or all of the propperty, whether real, personal, or mixed, of such association, and such borrowing may be for any purpose, including, without any limitation on the generality of the foregoing, protecting, or preserving the assets in his possession, declaring and paying dividends to members and creditors, providing for the expense of administration, or aiding in the reopening or reorganization of such association;

(p) May pay out of the assets of the conservatorship all costs and expenses of the conservatorship and all costs of carrying out or exercising his rights, powers, privileges, and duties as conservator, all as determined by him, except as otherwise provided herein; and

(q) May do such things, and have such rights, powers, privileges, immunities, and duties, whether or not otherwise granted in these rules and regulations, as shall be authorized, directed, conferred, or imposed from time to time in specific cases by order of the Federal Home Loan Bank Administration, or by amendment of these rules and regulations.

For the purposes of this section, (1) asset and property including any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, share or certificate of share of stock, or debt of the association, and right and power of the association, shall include any such asset or property, right or power of the conservator, and (2), the terms "Governor of the Federal Home Loan Bank System" and "said Governor" shall include any Deputy or Assistant Governor of the Federal Home Loan Bank System. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.6. Creditors.—The conservator may, after certification by the conservator to the Federal Home Loan Bank Administration that the assets of the association will be sufficient to meet all creditor obligations and that the condition of the association justifies, out of the assets in his possession,

(a) With the approval of the Governor of the Federal Home Loan Bank System, or any Deputy or Assistant Governor, make disbursements which the association was obligated to make on loan commitments and other valid contracts,

(b) With the approval of said Governor, pay salaries due officers or employees of the association, permit the payment of outstanding checks given in connection with valid creditor obligations, and pay valid creditor obligations,

or, in the absence of such certification or approval, may, out of the assets of the association in his possession, pay creditor obligations and make disbursements which the association was obligated to make on loan commitments, to the extent determined by said Governor to be compatible with the condition of the association and the proper conduct of its affairs. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529).

207.7 Share interests.—The conservator shall not accept any payments on or purchases, or make any repurchases, of share accounts, unless the Federal Home Loan Bank Administration shall otherwise direct by order, which order, or orders, shall be posted in a *conspicuous place in the* principal office of the conservator for conducting the affairs of the association, and such payments or purchases shall be accepted, or such repurchases made, only to the extent and in the manner, and with segregation to the extent, that the same, if any, may be directed in such order or orders. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.8. Examinations, inventories, reports, costs and expenses— (a) Inventory.—As soon as practicable after taking possession, the conservator shall make an inventory of the assets of such association as of the date of such taking possession, showing the value as carried on the books of the association, and the security therefor, if any, in whatever form the same shall exist, with a brief description of each such asset and such security. Such assets may be listed in such groups or classes as shall, to the satisfaction of the Governor of the Federal Home Loan Bank System, or any Deputy or Assistant Governor, afford full information as to their character and book value, and the conservator shall include a record of the creditor and share liabilities

of the association. One copy of such inventory shall promptly be filed with the Secretary to the Federal Home Loan Bank Administration, one copy with the Office of the Governor of the Federal Home Loan Bank System, and one copy shall be retained in the principal office of the association, so long as such office is maintained by the conservator.

(b) Examinations and audits.—Each Federal association for which a conservator has been appointed may be examined and/or audited (with appraisals when deemed advisable by the Federal Home Loan Bank Administration) by the examining division of the Federal Home Loan Bank Administration as directed by the Federal Home Loan Bank Administration. The cost, as determined by the Federal Home Loan Bank Administration, of examinations including office analysis thereof, audits, and any appraisals made in connection therewith, shall be paid from the assets of the association unless otherwise ordered by the Federal Home Loan Bank Administration.

(c) Forms and reports.—The conservator shall follow such accounting practices as may, from time to time, be prescribed by the Governor. The conservator shall make such reports as may be required by the Federal Home Loan Bank Administration or the Governor. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.9. Final discharge and release of conservator—(a) Final report.—At such time as the conservator be relieved of his duties, the conservator shall file with the Federal Home Loan Bank Administration a detailed report in form satisfactory to the Federal Home Loan Bank Administration.

(b) Final discharge.—Unless otherwise directed by the Federal Home Loan Bank Administration, upon the completion of the duties of the conservator or at such time as the conservator shall be otherwise relieved of his duties, an examination and audit may be directed by the Federal Home Loan Bank Administration in connection with the report of the conservator hereinbefore required. The accounts of the conservator shall be approved or disapproved, and, if approved, the conservator shall thereupon be given a complete and final discharge and release. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.10. Inspection of reports.—All inventories, statements, and reports of the conservator shall be in at least four copies unless otherwise directed by the Federal Home Loan Bank Administration or the Governor. One copy shall be filed with the Federal Home Loan Bank Administration, the other copies with the Office of the Governor of the Federal Home Loan Bank System, and each of the inventories, statements, and reports shall constitute permanent records of each conservatorship open for inspection at such times and on such conditions as may be from time to time directed by the Federal Home Loan Bank Administration or, in the absence of such directions, whenever the office of the Secretary of the Federal Home Loan Bank Administration shall be open for business. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.11. Authority of officers.—Any authority or requirement under section 207.5 through section 207.10 of the rules and regulations for the Federal Savings and Loan System for action, by order or otherwise, by the Federal Home Loan Bank Administration, or by the Governor, a Deputy Governor, or an Assistant Governor, may be performed by the Governor, a Deputy Governor, or an Assistant Governor. Without any limitation on the applicability of this section to other conservatorships, this section shall apply to any conservatorship existing at the time of the amendment effected by the adoption of this section, and to the conduct of and procedure under any conservatorship so existing. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C., 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.12. Delegation by conservator.—The conservator may delegate to such persons as he may designate any or all of the powers and authorities vested in the conservator by or under sections 207.3, 207.5, 207.6, and 207.7 of these regulations. Without any limitation on the applicability of this section to other conservatorships, this section shall apply to any conservatorship existing at the time of the amendment effected by the adoption of this section, and to the conduct of and procedure under any conservatorship so existing. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

208.1. Take possession, when.—The Federal Savings and Loan Insurance Corporation upon appointment as receiver for a Federal association shall forthwith take possession of the books, records and assets of every description of

such association. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.2. Procedure upon taking possession.—Upon taking possession, pursuant to § 208.1 of these rules and regulations, the receiver shall forthwith—

(a) Post a notice in substantially the following form on the door of the home office of such association:
———Federal Savings and Loan Association ————, is in the hands of the Federal Savings and Loan Insurance Corporation as receiver under appointment by the Federal Home Loan Bank Board.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER.

———————— By ————————————
Date (Title)

(b) Notify, by written notice served personally or by registered mail or telegraph, all banks, trust companies, and all other individuals, partnerships, corporations, and associations known to it to be holding or in possession of any assets of such association; and

(c) File with the Secretary of the Board a statement (1) that it has taken possession, pursuant to §204.6 of these rules and regulations, of such Federal association, and (2) of the posting and time of posting of the notice pursuant to the provisions of paragraph (a) of this Section, together with a copy of such notice; and such statement shall be conclusive evidence of the posting and time of posting of such notice. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.3. Succession.—Immediately upon the posting of the notice on the door of such Federal association as provided in paragraph (a) of §208.2 of these rules and regulations, the receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers, and privileges of the Federal association, its officers and directors, or any of them. Such officers and directors, or any of them, shall not thereafter have, exercise, or act in connection with, any such rights, titles, powers, or privileges, or any asset or property of any nature of the association; *Provided, however,* That nothing herein shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they

may have to the Board or its representatives designated to receive such petitions concerning such association, or to represent the association at hearings provided for in these rules and regulations. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.4. Disposition.—Unless the Board shall otherwise order, the receiver shall, within 20 days of its appointment, recommend to the Board a plan for the reorganization, consolidation, merger, or liquidation or other disposition of the association. Such recommended plan may provide that the receiver as such may (1) take over the assets of and operate the association, (2) take such action as may be necessary to put it in a sound and solvent condition, (3) merge it with another insured institution, (4) organize a new Federal savings and loan association to take over its assets, or (5) proceed to liquidate its assets in an orderly manner. The Board shall thereupon adopt a plan which may provide for the reorganization, consolidation, merger, liquidation, or other disposition of the association, which plan, including any amendments thereto and substitutions therefor ordered at any time by the Board, shall be carried into effect by the receiver. The facilities of the Board and of the Home Owners' Loan Corporation may be availed of in carrying out the plan. The Board may, at any time, order the association returned to its management and may, before returning the association to its management, regardless of whether such association is returned to its management, order a meeting of the shareholders for any purpose, including, but not limited to, election of new directors, or of the board of directors for any purpose, including, but not limited to, the filling of vacancies on the board of directors or the election of new officers, or may order meetings of both members and directors. Each such election shall be supervised by a representative of the Board. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.5. Powers and duties of receiver.—The receiver, after posting notice pursuant to paragraph (a) of § 208.2 of these rules and regulations, shall, in its name, in the name of the association, in the name of both, or otherwise, collect all obligations and money due such association, and may, in its name, in the name of the association, in the name of both, or otherwise:

(a) Do all things desirable or expedient in its discretion to carry on the business of such association to an extent con-

sistent with its appointment and to preserve and conserve the assets and property of every nature of such association;

(b) Exercise all the rights and powers of such association, including, without any limitation on the generality of the foregoing, any rights and powers under any mortgage, deed of trust, chose in action, option, collateral note, contract, judgment or decree, share or certificate of share of stock, or instrument of any nature;

(c) Pay off and discharge any taxes, assessments, liens, claims, or charges of any nature against the association or the receiver or any asset or property of any nature of such association;

(d) Pay out and expend such sums as it shall deem necessary or advisable for or in connection with the preservation, maintenance, conservation, protection, remodeling, repair, rehabilitation, or improvement of any asset or property of any nature of such association;

(e) Pay out and expend such sums as it shall deem necessary or advisable for or in connection with the preservation, maintenance, conservation, or protection of, or pay off and discharge any taxes, assessments, liens, claims, or charges of any nature against, any asset or property of any nature on which the association or the receiver has a lien by way of mortgage, deed of trust, pledge, or otherwise, or in which the association or receiver has an interest of value of any nature;

(f) Institute, prosecute, maintain, defend, intervene, and otherwise participate in any and all actions, suits, or other legal proceedings by and against the receiver or association or in which the receiver, the association, or its creditors or members, or any of them, shall have an interest, and in every way to represent such association, its members and creditors;

(g) Employ any attorney or attorneys, in connection with litigation or otherwise to give legal advice and assistance, for the receivership generally or in particular instances, and pay retainers and compensation of such attorney or attorneys, together with all expenses, including, but not limited to, the costs and expenses of any litigation, out of the assets of the association;

(h) Execute, acknowledge, and deliver any and all deeds, contracts, leases, assignments, bills of sale, releases, extensions, satisfactions, and other instruments necessary or

proper for any purposes, including without any limitation on the generality of the foregoing the effectuation or termination of any sale, lease, or transfer of real, personal or mixed property, or that shall be necessary or proper to liquidate or carry on the business of such association. Any deed or other instrument executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as if the same had been executed, as the act and deed of the association or otherwise, by the officers of such association by authority of its board of directors;

(i) Deposit the moneys and funds in any bank or banks insured by the Federal Deposit Insurance Corporation or in any Federal Home Loan Bank, or any other banks or other depositories approved for such purposes by the Board;

(j) Sell for cash or on terms, exchange, or otherwise dispose of, in whole or in part, any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, share or certificate of share of stock or debt, owing to such association;

(k) Sell for cash or on terms, exchange or otherwise dispose of, in whole or part, any or all of the assets and property of the association, real, personal, and mixed, tangible and intangible, of any nature;

(l) Surrender, abandon, and release any choses in action, or other assets or property of any nature, whether the subject of pending litigation or not, and reject or repudiate any lease or contract which it considers burdensome;

(m) Settle, compromise, or obtain the release of, for cash or other considerations, claims and demands against such association or the receiver;

(n) Settle, compromise, or release, for cash or other considerations, claims and demands in favor of the association or the receiver;

(o) With the approval of the Board and on terms and conditions approved by the Board, borrow money in any amount and from any source and in any manner, and execute, acknowledge and deliver notes, certificates, and other evidence of indebtedness therefor, and secure the repayment thereof by the mortgage, pledge, assignment in trust or hypothecation of any or all of the property, whether real, personal, or mixed, of such association, and such borrowing may be for any purpose, including, without any limita-

tion on the generality of the foregoing, facilitating liquidation, carrying on the business of such association, protecting or preserving the assets in its possession, declaring and paying dividends to members and creditors, providing for the expense of administration and liquidation, or aiding in the reopening or reorganization of such association;

(p) Pay out of the assets of the receivership all costs and expenses of the receivership and all costs of carrying out or exercising its rights, powers, privileges, and duties as receiver, all as determined by it, except as otherwise provided herein; and

(q) Do such things, and have such rights, powers, privileges, immunities, and duties, whether or not otherwise granted in these rules and regulations, as shall be authorized, directed, conferred, or imposed from time to time in specific cases by order of the Board, or by amendment of these rules and regulations. For the purposes of this section, asset and property including any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, share or certificate of share of stock, or debt of the association, and right and power of the association, shall include any such asset or property, right, or power of the receiver. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.7. Share interest claims.—(a) In the event the Board shall adopt a plan providing for the liquidation of the association, as provided in § 208.4 of these rules and regulations, the receiver shall, within one year from the date of such appointment, publish, in a newspaper printed in the English language and of general circulation in the city or county in which the home office of such Federal association is located, a notice to all shareholders of such Federal association to present their sworn proofs of claim of ownership thereof to such receiver on or before a date specified in such notice. The date specified in such notice shall be not less than 5 years after the date of the appointment of the receiver. Such notice shall urge that claims of ownership be presented promptly and shall be similarly published on dates approximately 1 year and 2 years respectively after the date of such first publication. Claims of ownership not filed within the period stated in the notice shall be disallowed, except as they may thereafter be approved by the Board for payment in whole or in part out of the assets of said Federal association remaining undistributed at the time of such approval. The receiver shall mail a similar notice

to any shareholder, shown to be such on the books of the association in the possession of the receiver, at the last address of such shareholder as the same shall appear on such books: *Provided, however,* That such notice need not be mailed to the holder of a share account that has been surrendered and transferred to the Federal Savings and Loan Insurance Corporation. At the time of the declaration of the first liquidating dividend, the receiver shall credit to a special reserve the proportionate shares of such liquidating dividend otherwise payable to the holders of unclaimed share accounts shown on the books of the association which appear to be outstanding and valid, and similar credits shall from time to time be made for any subsequent liquidating dividends as the same may be declared before the date specified in the notice hereinbefore provided for. The final liquidating dividend to shareholders whose claims of ownership have been allowed may include any sums held in such accounts or any portion thereof, but such dividend shall in no event be paid before the date specified in the notice hereinbefore provided.

(b) Any share ownership proved to the satisfaction of the receiver shall be allowed by the receiver. The receiver may disallow in whole or in part any claim of share interest not proved to its satisfaction, and notice of such disallowance together with reason therefor shall be served by the receiver upon the claimant. The mailing of notice of such disallowance to the last known address of any claimant appearing on the books or proof of claim shall be deemed sufficient for the purposes hereof. Unless such claimant shall file with the Board written request for payment regardless of such disallowance or rejection by the receiver within 30 days after the mailing of such notice (Sundays and holidays included), such disallowance or rejection shall be final except as the Board shall otherwise determine in its discretion.

(c) Upon the expiration of the time fixed for the presentation of claims of share interest by the notice provided for in paragraph (a) hereof, the receiver shall cause to be filed with the Board a full and complete list of such claims presented. Such list shall indicate the character of each claim therein listed and whether or not allowed by the receiver. At such other date or dates as may be ordered by the Board or determined by the receiver, a list of claims presented before such date shall be filed with the Board.

APPENDIX C

Orders of Home Loan Bank Board (or Federal Home Loan Bank Administration)

Federal Home Loan Bank Administration

Order No. 5082. Date March 29, 1946

Whereas, it has been and is hereby determined that the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action contemplated herein; now, therefore,

It Is Hereby Ordered That effective March 29, 1946, the Federal Home Loan Bank of Los Angeles shall be liquidated and reorganized and all assets and property of any kind or nature of such bank, including any unexpended amounts in approved and outstanding budgets and personnel but excluding officers and directors, are hereby transferred to the Federal Home Loan Bank of Portland and all the liabilities and obligations of such Federal Home Loan Bank of Los Angeles are to be assumed by the Federal Home Loan Bank of Portland and are hereby declared to be and become the liabilities and obligations of the Federal Home Loan Bank of Portland. The President of the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco) is hereby authorized and directed to execute, issue or sign in the name of the Federal Home Loan Bank of Los Angeles or in the name of the Federal Home Loan Bank of San Francisco as the successor and legal assignee of the assets, property, liabilities and obligations of the Federal Home Loan Bank of Los Angeles such instrument or instruments as may be necessary or advisable and to cancel, assign or otherwise dispose of in whole or in part, any lease under which the Federal Home Loan Bank of Los Angeles has been bound or committed. All members of the Federal Home Loan Bank of Los Angeles are to become members of the Federal Home Loan Bank of Portland and the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco) is ordered and directed to issue appropriate evidences of the ownership of all of the stock formerly held by the Federal Home Loan Bank of Los Angeles including stock purchased and held on behalf of the U. S. Government. The charter of said Federal Home Loan Bank of Los Angeles is hereby cancelled.

It Is Further Ordered and Directed That effective March 29, 1946, the said Federal Home Loan Bank of Portland shall move and is hereby moved to the city of San Francisco, California, and shall be known hereafter as the Federal Home Loan Bank of San Francisco. Subject to the Federal Home Loan Bank Act, as amended, and the charter and by-laws of the Federal Home Loan Bank of San Francisco, including right of dismissal, said bank shall have as its directors, officers, employees, attorneys, and agents the directors, officers, employees, attorneys, and agents transferred, elected, designated, or appointed, to, by or for the Federal Home Loan Bank of Portland for the calendar year 1946 and shall operate under the charter and by-laws used by the Federal Home Loan Bank of Portland until duly changed.

It Is Further Order and Directed That effective March 29, 1946, and until changed by the Board of Directors of the Federal Home Loan Bank of San Francisco and approved by the Federal Home Loan Bank Administration, the said Federal Home Loan Bank of San Francisco shall maintain a branch of said bank in the cities of Portland, Oregon, and Los Angeles, California.

It Is Further Ordered and Directed That in order to provide for adequate representation of the states in the Federal Home Loan Bank of San Francisco region, effective August 1, 1946, the terms of all directors of said bank shall expire and that prior to July 1, 1946, a new election of directors shall be held. The terms of all officers of said bank shall expire upon the designation by the Board of Directors after August 1, 1946, of new officers and their approval by the Federal Home Loan Bank Administration. In such election and in future elections of the Federal Home Loan Bank of San Francisco the states of Nevada and Arizona shall constitute one state with the right of minimum representation to be alternated between each of said states within the rules and regulations and orders of the Federal Home Loan Bank System providing for a minimum representation from each state in a Federal Home Loan Bank district. On or before July 1, 1946, the Federal Home Loan Bank Administration shall appoint or reappoint four public-interest directors whose terms shall begin August 1, 1946, but shall end respectively December 31, 1946; December 31, 1947; December 31, 1948; and December 31, 1949.

It Is Further Ordered and Directed That the Federal Home Loan Bank of San Francisco shall take such other action subject to the approval of the Federal Home Loan Bank Administration as may be necessary or desirable for the effective operation of the Federal Home Loan Bank of San Francisco.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

____ ____,
Secretary.

Federal Home Loan Bank Administration

Order No. 5083. Date March 29, 1946

Pursuant to Section 3 of the Federal Home Loan Bank Act, as amended, and the powers vested in me by law, the district of the Federal Home Loan Bank of Portland is readjusted and shall have added thereto the states of Arizona, California and Nevada, and the Territory of Hawaii.

The said Federal Home Loan Bank of Portland is moved to San Francisco and shall be known as the Federal Home Loan Bank of San Francisco.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

____ ____,
Assistant Secretary.

Federal Home Loan Bank Administration

Order No. 5084. Date March 29, 1946

Pursuant to Section 25 of the Federal Home Loan Bank Act, as amended, and the powers vested in me by law the Federal Home Loan Bank of Los Angeles is dissolved.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

____ ____,
Assistant Secretary.

FEDERAL HOME LOAN BANK ADMINISTRATION

Order No. 5254. Date May 20, 1946

WHEREAS, it has been determined that the Long Beach Federal Savings and Loan Association, Long Beach, California:

Is conducting its business in an unlawful manner;
Is conducting its business in an unauthorized manner;
Is conducting its business in an unsafe manner;
Has a management which is unsafe to manage a Federal savings and loan association;
Has a management which is unfit to manage a Federal savings and loan association;
Is pursuing a course that is jeopardizing the interests of its members;
Is pursuing a course that is jeopardizing the interests of its creditors;
Is pursuing a course that is jeopardizing the interests of the public;
Is pursuing a course that is injurious to the interests of its members;
Is pursuing a course that is injurious to the interests of its creditors;
and
Is pursuing a course that is injurious to the interests of the public;
and

WHEREAS, it has been determined to be in the interest of said association, its members, creditors, and the public to appoint a conservator to take possession of said association and to conserve its assets pending further disposition of said association and its affairs:

NOW, THEREFORE, A. V. Ammann is hereby appointed conservator for the Long Beach Federal Savings and Loan Association, Long Beach, California, to take possession of said association and to conserve its assets pending further disposition of said association and its affairs; and, as such conservator, to have and exercise all of the powers and rights, enjoy all of the privileges, and assume and perform all of the duties and responsibilities of his office accorded or imposed by law, the Rules and Regulations for the Federal Savings and Loan System, and orders issued by the Federal Home Loan Bank Administration, or otherwise.

* * * * * * *

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on May 20, 1946.

——— ———,
Secretary.

MORE DEFINITE STATEMENT OF THE CAUSES FOR THE APPOINTMENT ON MAY 20, 1946, OF THE CONSERVATOR FOR LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, LONG BEACH, CALIFORNIA

T. A. Gregory
350 East Fourth Street
Long Beach 2, California

The following is a more definite statement of the causes for the appointment on May 20, 1946, of a Conservator of the Long Beach Federal Savings and Loan Association:

1. Said Association, in the opinion of the Federal Home Loan Bank Administration, was conducting its business in an unlawful, unauthorized, and unsafe manner, and was pursuing a course that was jeopardizing and injurious to the interests of its members, creditors, and the public in that:

(a) During the period from September 11, 1945, to March 7, 1946, disbursements of funds of said Association totaling $14,500 were made to its President, T. A. Gregory, without proper voucher therefor, or explanation thereof in the records of the Association, itemized as follows:

September 11, 1945, T. A. Gregory	$1000.00
October 22, 1945, Wired to T. A. Gregory, Wash., D. C.	1000.00
November 5, 1945, Wired to T. A. Gregory, Wash., D. C.	1000.00
November 24, 1945, T. A. Gregory	1000.00
December 1, 1945, Wired to T. A. Gregory, Wash., D. C.	2000.00
January 19, 1946, T. A. Gregory	2000.00
January 31, 1946, Cash (Wired to T. A. Gregory)	1500.00
February 20, 1946, Cash (Wired to T. A. Gregory at Wash., D. C.)	2000.00
February 28, 1946, Cash (Wired to T. A. Gregory at Wash., D. C.)	2000.00
March 7, 1946, Cash (Wired to T. A. Gregory at Wash., D. C.)	1000.00
Total	$14,500

(b) Disbursements totaling $14,500, itemized under (a), were used for purposes beyond the scope of the Association's business.

(c) Funds of the said Association totaling $2455.60 were disbursed to Howard S. Leroy, an attorney at law at Washington, District of Columbia, on or about January 30, 1946, January 31, 1946, and March 6, 1946, although said attorney had not been retained by the said Association, nor were such funds paid to said attorney for the handling of any business of the said Association, or otherwise for the benefit of said Association.

(d) The Board of Directors of said Association attempted in the following manner to relieve T. A. Gregory from accountability to the said Association for its funds used by him for purposes beyond the scope of the said Association's business:

(1) The said Board of Directors, according to the minutes of a special meeting, dated January 16, 1946, voted to compensate T. A. Gregory retroactively in the sum of $11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment.

(2) The said Board of Directors, according to the minutes of the special meeting, dated January 16, 1946, voted to increase T. A. Gregory's salary from $8250 to $20,000 per year.

(3) On April 6, 1946, reimbursement of said Association's funds paid to T. A. Gregory and used by him for purposes beyond the scope of the Association's business, was recorded on the books of said Association by means of an offset against the purported liability of the Association to T. A. Gregory for the said sum of $11,750 and for the voted increase for the first three months of 1946.

(e) The Association, by vote of its Board of Directors, purportedly on January 16, 1946, undertook to compensate T. A. Gregory retroactively in the sum of $11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment, said purported retroactive salary increase being unlawful and unauthorized.

(f) The Association paid salaries and fees which were excessive and not commensurate with the services rendered.

(g) The Board of Directors of said Association on May 8, 1946, appropriated the sum of $100,000 of the funds of said Association for the purpose of restraining the proper use of safeguards and controls provided by the Congress of the United States with respect to Federal Savings and Loan Associations, and threatened the removal of said sum from the proper control of said Association.

(h) During the course of a regular examination commencing on May 18, 1946, by Examiners of the Federal Home Loan Bank Administration, a director and officer of the said Association unlawfully and improperly removed a cashier's check in the amount of $50,000, payable to the said Association and representing funds belonging to it, without accounting therefor.

(i) On or about May 8, 1946, the said Association, through its officers, executed a purported lease on a hotel property located at 332 American Avenue, Long Beach, California, owned by it to one George Turner for a 20-year period on terms which, in effect, would give to the said Turner the use of said property without adequate consideration therefor to the said Association.

(j) Said Association was being used for the personal gain of one or more officers and directors thereof, to the detriment of its members and creditors.

(k) Said Association, through its officers, engaged in activities which were inimical to the interests of veterans of the Armed Forces, including veterans of the Armed Forces who were members of the said Association.

(l) Certain directors of the said Association, namely: T. A. Gregory, J. E. Gregory, M. T. Killingsworth and S. I. Bacon, on or about May 18, 1946, undertook to convert, or attempted to convert, their shareholdings and other funds totaling approximately $21,000 into approximately 21,000 separate purported share accounts of $1.00 each, in violation of the rights of over 16,000 share account holders of said Association, and in violation, or attempted violation of their duties as directors.

(m) Said Association failed to file copies of audit of said Association made by F. W. Lafrentz & Co., Certified Public Accountants, Los Angeles, California, as of the close of business May 19, 1945, or thereabouts, as required by Section 203.2 of the Rules and Regulations for the Federal Savings and Loan System.

(n) The said Association failed to maintain its books of accounts and records correctly.

(o) The records or statements of the Association were falsified in that either

(1) The minutes of the Board of Directors' meeting of January 16, 1946, were falsified by the entry therein of actions by said Board purporting to have been taken increasing T. A. Gregory's salary from $8250 to $20,000 per year, and purporting to authorize the payment of $11,750 to T. A. Gregory as extra compensation for the year 1945. or

(2) The said Association's liabilities were misrepresented by the Board of Directors to the Federal Home Loan Bank Administration in monthly reports for the months ending January 31, 1946, February 28, 1946 and March 30, 1946.

2. Said Association, in the opinion of the Federal Home Loan Bank Administration, had a management which was unfit and unsafe to manage a Federal Savings and Loan Association in that, among other things,

(a) The matters set forth in sub-items (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o) of Item 1, above are herein incorporated by reference.

(b) T. A. Gregory in 1934 (but only recently known to the Federal Home Loan Bank Administration) acquired control of the Reliable Building-Loan Association, Long Beach, California, and so manipulated its affairs that he was enabled to acquire, through the medium of Somerset Finance Co., a substantial number of certificates of the Reliable Building-Loan Association at a small fraction of their true value, and subsequently redeemed said certificates at the Reliable Building-Loan Association at their true value, while like treatment was denied to others, all to the detriment of the members of the said Reliable Building-Loan Association, and to his own personal gain.

(c) The officers of said Association failed to keep or cause to be kept the books of account and records of the Association correctly.

/s/ J. Aldrich Hall, Attorney for Federal Home Loan Bank Administration.

Dated: May 29, 1946.

HOME LOAN BANK BOARD

No. 388, Date January 17, 1948

BE IT HEREBY RESOLVED that the Federal Home Loan Bank Administration Order No. 5254 appointing a Conservator for the Long Beach Federal Savings and Loan Association be and the same is hereby rescinded, such rescission to become effective upon the request of the shareholders of said Association through their authorized representative that the assets of said Association of any and every nature whatsoever belonging to or pertaining to said Association, together with all books, records and accounts of every nature pertaining to said Association be delivered to such shareholders upon demand made through their authorized representative.

BE IT FURTHER RESOLVED that the Conservator be and he is hereby authorized and directed to deliver all of the aforesaid assets, records and books of any and every nature to said shareholders through their authorized representative and to make a full and complete accounting to said shareholders for all assets and liabilities of any and every nature pertaining to said Association, and a copy of such accounting be filed with the District Court of the United States, in and for the Southern District of California.

BE IT FURTHER RESOLVED that the Conservator be, and he is hereby directed, to make available for inspection at the office of the Association all of the records and books of said Association to counsel for the Shareholder's Committee or an agent of the shareholders of said Association, or to a representative of the District Court of the United States, in and for the Southern District of California, Central Division.

BE IT FURTHER RESOLVED that a certified copy of this resolution be forthwith delivered to the above named Court and to counsel for each of the parties of record in actions numbered 5254 P. H. and 5678 (WM) PH in said Court, except counsel for Intervenors in said actions, and that a copy be furnished to the Conservator.

* * * * * * *

By the Home Loan Bank Board

J. FRANCIS MOORE,
Secretary.

HOME LOAN BANK BOARD

No. 2015, Date: September 9, 1949

WHEREAS it appears to the Home Loan Bank Board that:

1. The Long Beach Federal Savings and Loan Association, Long Beach, California, has failed to file the monthly and annual reports required by the Rules and Regulations for the Federal Savings and Loan System;

2. Said Association has failed and refused to furnish an affidavit of its president or secretary or other officer that, to the best of his knowledge and belief, the books of said Association correctly reflect the financial condition thereof, as required of all Federal savings and loan associations;

3. Said Association has failed to pay the premiums for insurance of its accounts and the installments thereon due and payable on or about June 5, 1948, December 5, 1948, and June 5, 1949, in the total amount of $36,487.25, in violation and disregard of the statutes of the United States, the Rules and Regulations for Insurance of Accounts, and its contract with the Federal Savings and Loan Insurance Corporation;

4. Said Association and its officers have committed and are committing other violations of law and regulations, including violations set out in the More Definite Statement submitted to said Association on May 29, 1946, and have pursued and are pursuing a course that is jeopardizing and injurious to the interests of its members, creditors, and the public;

IT IS HEREBY ORDERED, pursuant to the authority vested by law in the Home Loan Bank Board and pursuant to the Rules and Regulations for the Federal Savings and Loan System, that the Long Beach Federal Savings and Loan Association, Long Beach, California, appear at a hearing, as hereinafter provided, and show cause, if any it have, why the Home Loan Bank Board should not, for the reasons hereinbefore stated, enter its order or orders for such action as it deems necessary or appropriate, including the appointment of the Federal Savings and Loan Insurance Corporation as receiver for said Association;

And It Is Further Ordered that said hearing be held before the Home Loan Bank Board or a member thereof or before a Hearing Officer of this Board, as shall be determined by the Board, and be convened at 10:00 o'clock A.M. on October 25, 1949, in Room 831, Federal Home Loan Bank Board Building, 101 Indiana Avenue, N. W., Washington, D. C. The Board or member thereof, or the Hearing Officer who presides at said hearing is hereinafter referred to as Presiding Officer;

And It Is Further Ordered that the Presiding Officer shall have complete charge of the hearing and shall have authority to: administer oaths or affirmations; receive, admit, allow, exclude and deny petitions, motions, and evidence; limit the time within which briefs and reply briefs may be filed and require the furnishing of copies thereof to other parties; make rulings and note objections; hear arguments; adjourn the hearing from time to time and from place to place; and do all such things and exercise all such powers as are necessary or proper to the orderly conduct of the hearing;

And It Is Further Ordered that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file with the Presiding Officer a petition for leave to intervene at said hearing;

And It Is Further Ordered that the Long Beach Federal Savings and Loan Association, the Home Loan Bank Board, and any party whose petition for intervention has been allowed, shall have the right, by counsel or otherwise, to appear and be heard at the hearing, to produce, examine and cross-examine witnesses, to introduce documentary or other evidence, and to file briefs and reply briefs;

And It Is Further Ordered that if the Presiding Officer is a member of the Board or a Hearing Officer of the Board he shall, after the close of the hearing, make Proposed Findings of Fact which he shall file as promptly as possible with the Secretary to the Home Loan Bank Board together with (1) the complete transcript of testimony taken, and any exhibits, briefs or other material incorporated in the record of said hearing, and (2) the certificate of the Presiding Officer that he has mailed, by registered mail, a copy of the said Proposed Findings of Fact to the Long Beach Federal Savings and Loan Association, Long Beach, California;

And It Is Further Ordered that the Secretary or an Assistant Secretary to the Home Loan Bank Board, promptly upon the filing of said Proposed Findings of Fact and said transcript, advise all parties, by registered mail, return receipt requested, of the filing thereof, and make such Proposed Findings of Fact and such transcript available for inspection by any party at a price which will cover the reasonable cost of preparation, as determined by the Secretary;

And It Is Further Ordered that the Secretary to the Home Loan Bank Board shall receive for the consideration of the Home Loan Bank Board objections of parties to the said Proposed Findings of Fact, provided that said objections are received within forty-five days from the date on which the said Proposed Findings of Fact are filed by the Presiding Officer with the Secretary to the Home Loan Bank Board as hereinbefore provided;

And It Is Further Ordered that within a reasonable time after the expiration of the time for filing objections to the Proposed Findings of Facts or, if the hearing is held before the Board, within a reasonable time after the close of the hearing, the Board will make a final determination and enter its order or orders thereon;

And It Is Further Ordered that notice of said hearing be served by the Secretary to the Home Loan Bank Board by mailing a copy of this Order, by registered mail, to the Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, to Thomas A. Gregory, % Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, to J. E. Gregory, % Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, and to Ethel L. Roberts, % Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California.

By the Home Loan Bank Board,
J. Francis Moore, Secretary.

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